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ELEMENTS OF POLITICAL SCIENCE

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BY

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PART I

THE NATURE OF THE STATE

CHAPTER I

POLITICAL SCIENCE, THE THEORY OF THE STATE

1. Definition and Scope of Political Science. — 2. Relation to Other Sciences. — 3. Meaning of the State; its Essential Attributes. — 4. The Distinction between State, Society, Government, and Nation. — 5. The State and a Common Faith. — 6. The Ideal State.

1. Definition and Scope of Political Science. A treatise on political science must naturally begin with some discussion as to the scope and province of the science itself, and its relation with the other branches of human knowledge of a kindred character. This is especially necessary for two reasons. In the first place the term political science has been used with a good deal of latitude, not to say ambiguity, both in colloquial language and in scientific discussion. In the second place the relationship between this and various other departments of knowledge, such as jurisprudence, history, and economics is an extremely intimate one. It is necessary, therefore, to endeavor as accurately as may be to define the proper field of political science, and to indicate its connection with other branches of learning.

An elaborate definition may better be reserved for later consideration. For the present a simple and convenient starting-point may be found in the statement, inadequate though it is, that political science deals with government. The word government, used in its widest sense, rests on the fundamental idea of control and obedience; it implies authority, and a submission to that authority. It thus calls before our minds a phenomenon which may be considered almost coextensive with human society as it at present exists, and which reaches back into the past almost as far as the history of human society itself. True it is that as we follow its retreat into the remote periods of history, it recedes with a diminishing outline that tends towards an unseen vanishing-point. But in this it only shares in a characteristic common to all the products of social evolution.

Now the phenomenon of government, as we view it in the past and in the present, shows anything but a uniform appearance. It differs constantly in its form, it differs in its scope and purpose, and differs most notably in the varying degrees of its complexity. These divergences in the concrete aspect of government are seen at once by comparing the rude organization by which a primitive pastoral tribe is held in loose cohesion, the city state of the Greeks, the feudal system of the middle ages, and the intricate mechanism of the modern national state. It is out of these variations offered by the different types of human organization in which the common element of government is contained that political science arises. In all branches of investigation it is the diversities and not the similarities of observed phenomena that afford the primary motive for speculation. In the physical world the diversities of form, function, and structure among plants and animals give occasion to the investigations of the botanist and the naturalist. If all plants and animals had been of a uniform fashion and function their similarity would have been accepted as a matter of course. It is the fact that this similarity does not exist that gives the initial stimulus to man's investigations. Similarly in the domain of human institutions the heterogeneous and complex appearance of the phenomena in question affords the basis of political science. Its field lies in the examination and analysis of the varying forms of human organization in which the element of social control is embodied.

At this point emerges a further analogy between the study of our physical and social environment. In each case the phenomena observed are found to be in a constant state of change and movement. New forms replace the old, the whole representing a graded series of ascending complexity in which higher and higher structures correspond to functions increasingly elaborate. In the physical world, life, from being simple and rudimentary, becomes complex and differentiated. New organs are developed and higher functions performed. In the superorganic world the process of social evolution is continuous. Here too are successive stages of progress in which the form and character of human institutions undergo an unceasing alteration in accordance with the changing environment of social growth. The study of governmental forms must therefore in an eminent degree be a comparative and historical study. It must not content itself with a mere analysis of political institutions as existing at any given point of time; it must take account of the process of change and evolution and the alteration of social and intellectual environment. This is what is meant by the statement that the investigations of political science must be of a dynamic and not a static character. They must be directed towards the proper interpretation of movements and tendencies in addition to the analysis of the status and structure of existing institutions. The organized aspect of the community, the state, must be treated not only as an actuality, but also as a product of the past, and as the basis of the life of the future.

2. Relation to Other Sciences. Herein appears the connection between history and political science, a connection somewhat difficult to state in precise terms without making one of the two assume a subordinate character. There is indeed a natural tendency on the part of the political scientist to view history somewhat in the light of mere raw material, and an equally natural tendency on the part of the historian to view political science somewhat in the light of an emanation, one might almost say an excrescence, of history. It may with fairness be said that the two studies are mutually contributory and complementary. Political science would certainly be impossible without history; history would lose its main significance without at least an unconscious political science. The facts of history — not all of them, but such as are significant for the study of institutions — constitute a part of the groundwork of political science; not, it is to be noted, the whole groundwork, for political science must also build upon ethical and psychological foundations. Thus one might be tempted to employ the terminology of the logician and say that some of history is part of political science, the circles of their contents over-lapping an area enclosed by each. Hence it is that in the subdivisions of political science offered by some writers "historical political science," or the history of political institutions, is one branch of the main subject.[1] The connection between these allied branches of knowledge has been well indicated by Professor Seeley, who tells us that political science is the fruit of history, and history is the root of political science.[2] A recent American writer[3] has illustrated the relationship in a still more striking manner by saying that history offers the third dimension of political science.

But while commenting on the intimate interdependence of these two branches of learning, their essential difference must not be forgotten. Political science has no concern with history in its purely narrative aspect; it has no interest in the mere cumulation of instances; nor has it any interest in the military, commercial, or economic aspects of history as such; only in so far as these bear upon the evolution of organized social control, only so far as they elucidate the nature of the state, are they of import for the student of political science. The latter must revert to history for much of the material of his study, but always in an eclectic or selective fashion, coördinating his facts with a view to their special significance. Thus, for example, the history of the Puritan colonies of North America is of primary interest to the student of political science as illustrating the growth of democratic self-government, the progressive application of the federal principle of political consolidation, the relations of church and state, and the evolution of written constitutions. The economic life of the colonies is of only secondary and indirect importance. The religious controversies of the period as such, the romantic aspects of the history of the time, — the adventurous intercourse of settlers and savages, the changes of manners, speech, and costume occasioned by the new environment, have still less bearing on the problems of political science. Similarly the domain of the historian has its distinct limitations. Dr. Georg Jellinek accurately circumscribes the province of history as follows: "History presents to us not only facts but the causal connection between the facts. It differs, however, from the theoretical sciences in that it always examines concrete cases of cause and effect, never abstract types and laws. If the historian undertakes this he passes the bounds of his own province and becomes a philosopher of history or a sociologist. It is true that no historian will be willing entirely to forego this higher aspect of history, but there is no science which offers to its students a complete self-sufficiency."[1]

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[1] Compare W. W. Willoughby, *The Nature of the State*, chap. i.

[2] J. R. Seeley, *Introduction to Political Science.* Compare also the following: "The science of politics is the one science that is deposited by the stream of history, like the grains of gold in the sand of a river." Lord Acton, *The Study of History.*

[3] W. W. Willoughby, *op. cit.*

Political science stands also in close relation to political economy. The purpose of the latter is to investigate "man's activity in pursuit of wealth."[2] It deals with the production and distribution of wealth under the influence of forces both material and psychological. Inasmuch as the production and distribution of material wealth is very largely conditioned by the existing form of government and the institutional basis of economic life, the study of political economy is brought into an intimate relation with that of political science. The system of the English school of classical economists, for instance, is presumed to flow from the original postulates of private individual property, of unimpeded contract under a social sanction, and a mobility of the strata of society unhindered by non-economic forces. Conversely it is also true that political institutions are greatly affected by economic circumstances. The particular form of government existing at any period and place, and the direction and extent of its activity, are largely dependent on the economic life of the community in question. Thus one would naturally expect the political institutions of a migratory pastoral tribe to differ from those of a community deriving its support from a fixed form of agriculture, while each of them would differ in the form and character of its government from a manufacturing population centred in great cities. The state, in a word, is conditioned by its economic environment.[1] Nor is it only in their fundamental bases that the sciences of economics and politics stand in close relation, for many specific subjects of inquiry belong in a measure to each of them. Such questions as the social control of monopoly, the governmental management of railroads, and the municipal ownership of public utilities present both an economic and a political aspect. To the economist the problem is one of economic efficiency and equitable distribution; to the student of political science it is a question of administrative organization.[1]

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[1] *Recht des Modernen Staates*, vol. i, chap. i.

[2] "Political Economy, or Economics, is a study of mankind in the ordinary business of life; it examines that part of individual and social action which is most closely connected with the attainment and with the use of the material requisites of well being." Marshall, *Principles of Economics*, vol. i, bk. i, ch. i.

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[1] The line of thought here suggested forms the basis of what is called the materialistic theory of history. See below, chap. iii.

The relation of political science to various other branches may be discussed more briefly. Constitutional law, the analysis of the organization of a particular state at a particular time, would seem to be best classed as a subdivision of political science, or at any rate to cover a large field in common with it. Opinion might also differ as to whether international law,[2] dealing with the relation of states with one another, should more properly be classed as an included or only a kindred subject. It may at any rate be said that in measure as international relations develop into the fixity of a true international law, — a code enforced by a recognized authority, — so does international law become merged in the domain of political science. Last of all may be mentioned the relative position of political science and sociology. Here the former must be considered in the light of an included portion of the more general field. Sociology deals not only with organized communities, but also with communities in which the element of social control is as yet feebly differentiated. It deals not only with the legal and coercive relationship of man with his fellows, but also with the evolution and status of customs, manners, religion, and economic life. Most important is it to observe that sociology treats not only of conscious but also of unconscious social activities.[1] How far such a science can be anything more than a group of subdivisions, or a name for a sort of general wisdom in regard to man's social environment, gained from specific studies, is perhaps open to question. Certainly in the hands of many of its exponents it seems to lose in intensity what it gains in width. Nevertheless, if one accepts the "science of society" on its own terms, it is proper to consider that it includes political science as one of its subdivisions. On this basis one may proceed to a formal definition of political science, which may best be accepted in the form offered by Paul Janet: "Political Science is that part of social science which treats of the foundations of the State, and of the principles of government." Beside this may be placed the definition of J. K. Bluntschli, which draws especial attention to the dynamic nature of the study involved: "Political Science is the science which is concerned with the State, which endeavors to understand and comprehend the State in its conditions, in its essential nature, its various forms and manifestations, its development."[1]

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[1] The ambiguous relation in which the terms "political science" and "political economy" stand to one another is rendered still more confusing by the divergent usages of leading American universities. At Harvard "Economics" is a subdivision of the department of "History and Political Science." At Yale both "Economics" and "Politics" appear under the departmental title of "Social Sciences." At Chicago "Political Economy" and "Political Science" constitute separate departments.

[2] Jellinek considers international law a branch of jurisprudence (*Rechtswissenschaft*), which is itself a subdivision of political science.

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[1] "Of all the multifarious projects for fixing the boundary which marks off political from the more general social science, that seems most satisfactory which bases the distinction on the existence of a political consciousness. Without stopping to inquire too curiously into the precise connotation of this term, it may safely be laid down that as a rule primitive communities do not, and advanced communities do manifest the political consciousness. Hence, the opportunity to leave to sociology the entire field of primitive institutions, and to regard as truly political only those institutions and those theories which are closely associated with such manifestation." W. A. Dunning, *History of Political Theories, Ancient and Mediæval*, Introduction, xvi. — But compare with this the following: "Human society truly begins when social consciousness and tradition are so far developed that all social relations exist not only objectively as physical facts of association, but subjectively also in the thought, feeling, and purpose of the associated individuals." Giddings, *Theory of Sociology* (*Annals Am. Acad. Pol. and Soc. Science*, 1894).

3. Meaning of the State; its Essential Attributes. Political science, then, deals with the state; it is, in short, as it is often termed,[2] the "theory of the state." The word "state" is sufficiently familiar to have been used in the preceding discussion without explanation. It is now necessary to make a nearer analysis of the exact meaning to be attached to the term. An examination of the ordinary senses in which the word is used shows at once a considerable latitude in its employment. Thus when we speak of the different "states" of Christendom, or refer to France, Germany, etc., as the leading states of Europe, the word seems roughly to correspond with such terms as country, international power, etc. When on the other hand we talk of the relations existing between the "church and the state," we have no reference to international affairs; the idea implied is rather that of association or organization. Again, in such uses as "The State and the Individual" (the title of the recent work on political science already mentioned), or in the title of one of Herbert Spencer's books, "The Man versus the State," the word is plainly used to imply a contrast between the individual citizen and the collective aspect of the community. Finally, in such phrases as "state aid to the poor," "state control of railroads," etc., what is thought of is not so much the community collectively as the special machinery or organized agency through which the community acts.

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[1] For convenient comparison the following definitions of allied sciences may here be noted: —

(1) SOCIOLOGY. "Sociology, defined as the science of social phenomena, includes all of these social sciences (that is, economics, politics, history, etc.); but in this general use of the term it is not a distinct science, but rather the name for a body of knowledge, including several sciences. The more definite sphere of sociology as a science is indicated when we recognize that each of the sciences dealing with social phenomena involves a theory as to the nature of society." A. Fairbanks, *Introduction to Sociology*. "I am tempted to define Sociology as the science of associated humanity, that is, of humanity so far as it is united and so far as it is associated." J. H. W. Stuckenberg, *Introduction to the Study of Sociology*. All the writers on sociology discuss its claim to existence as a science, though formal definitions are few. Compare Herbert Spencer, *Study of Sociology*, chap. ii; De Greef, *Introduction à la Sociologie*, part i, chap. i; Small and Vincent, *Introduction to the Study of Society*, bk. i, etc.

(2) JURISPRUDENCE. Jurisprudence is the "formal science of those relations of mankind which are generally recognized as having legal consequences. . . . It may . . . be defined provisionally as the formal science of positive law." T. E. Holland, *Elements of Jurisprudence*.

[2] See, for example, M'Kechnie, *The State and the Individual*, Introd.

Out of the different elements here embodied we may construct an exact conception of what is meant by the state in the technical language of political science. It embodies as the factors of which it is composed: —

I. A territory.
II. A population.
III. Unity.
IV. Organization.[1]

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[1] The requisites are thus stated by Bluntschli. He prefers to add "sovereignty," a factor which seems, however, to result from the combination of the last two given above, and the nature of which is considered in a later chapter (part i, ch. iv).

Let us briefly examine these in turn. Without a definite territory there can be no state. The Jews, being scattered abroad and dissociated from the occupation and control of any particular territory, do not constitute a state. Professor Holland in the definition given in his "Elements of Jurisprudence," speaks of a "numerous assemblage of human beings *generally* occupying a certain territory." But it seems advisable to insist on the idea of land being necessary. Equally necessary is a population. It goes without saying that an uninhabited portion of the earth, taken in itself, cannot form a state. The third requisite is said to be unity. By this is meant that the territory and population in question must form no part of a wider political unit; nor must the territory contain any portion or portions which while forming geographically a part of it, are not a part of it politically. The island of Haiti is a geographical unit, but being divided into the separate republics of Haiti and Santo Domingo, does not present the unity required to constitute a state. In the same way the separate "states" of the American Union are not states in the technical sense of the term, since each forms part of the single political entirety known as the United States. The United States as a totality constitutes a state; the "state" of Massachusetts does not. The final requisite, that of organization, is one that must be carefully noted. Even granting that we have a territory and population disconnected from the rest of the world, and thus in a sense a unit, we have not yet a state. Imagine, for example, that a "numerous assemblage of human beings," to use Professor Holland's phrase, were deposited upon some uninhabited island not owned or controlled by any existing government. Here we should have land and population and unity, but the inhabitants, having as yet no cohesion or connection, would not form a state. Imagine however that these inhabitants, being persons, we may suppose, accustomed to live under a settled government, should agree to form themselves into an organized body and to vest the control of all of them in the hands of certain among their number. We should then have a state. Or let us imagine a very different state of affairs. Suppose that a certain number of the inhabitants were enabled by their superior physical force or cunning to reduce the others to a condition of submission, so that settled relations of control and obedience were established. In this case too there would be a state. For the organization needed to constitute a state need not be one established by mutual consent or one of an equitable nature. The mere existence of settled obedience to a superior, coercive force is all that is required. Any form of despotism or tyranny which fulfills these conditions establishes a political state just as much as does a government whose authority rests on a general acquiescence.

Such, then, is the nature of the state. As formal definitions we may cite the following. (1) " A State is a people organized for law within a definite territory " (Woodrow Wilson).[1] (2) " The body or community which thus by permanent law, through its organs administers justice within certain limits of territory is called a State " (Theodore Woolsey).[2] A more elaborate definition, the full bearing of which will appear in our discussion of sovereignty, is given by Professor Holland:

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[1] W. Wilson, *The State.*

[2] T. Woolsey, *Political Science.*

"A State is a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority or of an ascertainable class of persons is, by the strength of such a majority or class, made to prevail against any of their number who oppose it." [1]

4. The Distinction between State, Society, Government, and Nation. The meaning to be attached to the word state will be rendered more precise by distinguishing it from society, government, and nation. The term society has no reference to territorial occupation; it refers to man alone and not to his environment. But in dealing with man its significance is much wider than that of state. It applies to all human communities, whether organized or unorganized. It suggests not only the political relations by which men are bound together, but the whole range of human relations and collective activities. The study of society involves the study of man's religion, of domestic institutions, industrial activities, education, crime, etc. The term government, on the other hand, is narrower than state. It refers to the person or group of persons (which in a modern community will be very numerous) in whose hands the organization of the state places for the time being the function of political control. The word is sometimes used to indicate the persons themselves, sometimes abstractly to indicate the kind and composition of the controlling group. The ordinary citizens of a community are a part of the state, but are not part of the government. The term has moreover no reference to territory. The distinction will appear more evident in our subsequent discussion of sovereignty.[1]

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[1] T. E. Holland, *Elements of Jurisprudence.*

In the next place it is to be observed that nation and state are two distinct conceptions. The term nation, though often loosely used, is properly to be thought of as having a racial or ethnographical significance. It indicates a body of people — the Germans, the French, the Hungarians, etc. — united by common descent and a common language. But such divisions by no means coincide with the political divisions of the civilized world into states. Austria-Hungary constitutes a single state, but its population is made up of members of a great many different races. The political division of the civilized world into states freely intersects with the division into races, although sometimes the political units — as in the case of modern France — are almost coincident with the ethnographic. The relation between political organization and nationality has been a changing one. In the classical world, in the city states of ancient Greece and Italy, kinship among the citizens was considered an elemental factor in the composition of the state. In ancient Athens and Sparta persons of alien race were not considered as members of the political community. Hence in the political thought of classical Greece the conception of the state is limited to a small area occupied by persons of the same race. In the Roman world, the original conception of a city state with a common nationality was transformed by the process of absorption and conquest into the larger conception of a world-wide state and universal sovereignty. Nationality is here lost from sight. The foreign nations occupying the subjugated provinces were recognized by virtue of the Emperor Caracalla's act of general enfranchisement (A. D. 212) as citizens of the universal empire. Such a conception, as will be seen in a later chapter, long survived as the basis of European polity, though existing only in the shadowy form of the titular Holy Roman Empire. In actual fact, however, it was displaced by other political conceptions. Feudalism brought with it the notion of territorial sovereignty and dynastic supremacy. A state became coincident with the domain owned, if one may use the term, by a particular house and its descendants, and quite irrespective of the nationalities of the subject peoples. States were formed out of communities of varying nationalities by inheritance, by cession, by marriage of their sovereigns. Witness for example the sovereignty of Henry II over Anjou, Aquitaine, etc.; the claim of Edward III to the crown of France; and at a later date, the empire of Charles V, who inherited Burgundy, Spain, part of Italy, and various Austrian territories. To a large extent this political fusion has fortunately been accompanied by a fusion of languages, as in the amalgamation of modern France.

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[1] Professor Burgess in his *Political Science and Constitutional Law* adopts a different basis of distinction : "state" and "government" are each made to refer to the organs of social control and not to the territory or population ; the latter term designates the ordinary mechanism of administration, the former the supreme body having absolute legal power. See vol. i, *Political Science and Constitutional Law.*

It was in the nineteenth century that the claim of nationality as the paramount basis of state organization strongly asserted itself. The great political upheaval consequent upon the American and French revolutions led to an intense national movement in most parts of Europe. Under its influence modern Italy has been converted (1815–1870) into a national state. Germany has assumed a definite national form in the modern German Empire (1871), whose boundaries, however, are not identical with those occupied by the German people. In other countries — Hungary, Ireland — the same movement has been seen in abortive form, while the modern aspirations of Pan-Slavism, Pan-Germanism, and "unredeemed" Italy foreshadow the part that nationality is to play in the organization of the states of the future. Common nationality is therefore, though not an actual requisite in the composition of the state as it now exists, a potent factor in its formation.

5. The State and a Common Faith. At various periods in the world's history we find the idea that the existence of a common religious faith among the members of the state is essential to its existence. Such was the dominant element in the composition of the ancient Jewish theocracy. In the period following the reformation in Europe heretical belief was considered by both Protestant and Catholic monarchies an offense against the state and was punished as such. In the theocratic Puritan colonies in America (Massachusetts and New Haven) only the members of the church were at first admitted to the exercise of political rights. With the growth of the doctrine of religious toleration such a view of the state has passed away. The civil authority and the civil bond among the citizens is dissociated from their religion. In many countries, however, established churches supported by the state remain as historic survivals of the earlier point of view.

6. The Ideal State. In all of the foregoing analysis we have treated of the state as it actually exists, not the state as it might be if viewed in its perfect form. This is the distinction made by the German writers [1] between the conception and the idea of the state. The conception of the state at any particular historical period is found in the common attributes of the states actually existent. The idea, on the other hand, is the ideal of perfect form of which any actual state is only an approximate realization. This ideal has varied from age to age. To the Greeks the ideal was to be sought in the perfected form of the city state. In our own day the national state has served as the embodiment of perfect political organization. But a wider ideal is conceivable in the form of the world state or state universal. The realization of such a political organization, as has been said, was long the haunting ideal of European policy. We see it reflected in the claims of the Roman emperor, in the less substantial claims of the Eastern emperor at Constantinople after the fall of Rome, in the resuscitation of the empire by Charles the Great (A. D. 800), and in the vague sovereignty of the Holy Roman Emperor from that date until the abolition of the titular dignity (1806) through the power of Napoleon. The same ideal hovers before us as offering the goal of the political organization of the future. The development of international relations that could lead to such an end will be discussed in a later chapter.

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[1] See J. K. Bluntschli, *Theory of the State*, bk. i, chap. i.

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CHAPTER II

ORIGIN OF THE STATE; FALLACIOUS THEORIES

1. Theory of the Social Contract. — 2. Application made of the Theory by Hobbes, Locke, and Rousseau. — 3. Criticism of the Theory. — 4. The Theory of Divine Origin. — 5. The Theory of Force.

1. Theory of the Social Contract. After a preliminary investigation of the proper province of political science, the topic which of necessity takes the first place in our inquiry is that of the origin of the state. How has it come about that men are everywhere found living under some form of authoritative control? What is the origin of government and law? Speculation as to the beginnings of government is not merely a matter of historical curiosity, for it is intimately associated with the more important question of the justification of government, — the right of the state to be. The present subject thus brings before us both a historical and an ethical enquiry, — the investigation of the facts as to the actual beginnings of political forms and the discussion of the bearing of these facts on the question of the rightfulness or wrongness of the existence of government.

To examine and reject a fallacious hypothesis is often a means of arriving at the truth. In the present instance a presentation of some of the mistaken theories proposed as to the origin of the state may aid us in moving towards a correct one. The different opinions which we shall briefly review have had such great influence in the formation of existing political institutions that a proper understanding of them is necessary in order to appreciate the forces operative in the growth and structure of modern governments. The purpose of the ensuing discussion is not, therefore, the merely sophistical task of demolishing hypotheses of straw. The rejection of what is false in the speculative theories of the past will aid in establishing more valid conclusions on the residual basis of what is true.

Foremost in historical importance of all the different views concerning the origin of the state, is the theory of the social contract. As old as political speculation itself, and prëeminent in its influence, it stands written large upon the history of human thought. Postponing for the moment the treatment of the beginnings and growth of the theory, let us first examine in broad outline the general content of the doctrine of the social contract. It professes to offer an explanation of the origin and justification of government. To do this it starts from the fundamental assumption that the past history of mankind may be divided into two periods, the first of which is antecedent to the institution of government, the latter subsequent to it. During the first of these periods, man is found in the "state of nature," uncontrolled by any laws of human imposition, and subject only to such regulations as are supposed to be prescribed to him by nature itself. This code of regulations, or rather, since it is nowhere written down, the spirit by which such a code might be presumed to be inspired, is spoken of as the law of nature, or natural law. This primitive stage of natural society man is presently compelled to desert. Whether it be that this state is too idyllic to last, or whether it becomes in the course of time and by reason of mutual rapacity too inconvenient to be tolerated, is a point of dispute among the exponents of the theory themselves. In either case man is led to substitute for it a union with his fellowmen in which, abandoning the isolation of the "natural" individual, all are joined into one civil society or body politic. Each now stands in a vastly different relation to his fellow-men. Submitting himself to the joint control of all, he receives in return the benefit of the joint interest of all in his protection. To safeguard the security of all members of the body politic (or state), a code of law is enforced by all against the possible rapacity of each. Thus while each loses the "natural liberty" that he enjoyed in the antecedent state of nature, he gains in return the security to which he is naturally entitled, and which is now guaranteed to him by the covenant of all his fellows. Human law is substituted for a natural law, and the individual in submitting to social duties finds himself clothed with social rights. The process, or at any rate the result of it, has very much the appearance of a contract or bargain dictated by the individual's own interest, an exchange of obligations in return for privileges. Whether the bargain is to be looked upon as one that actually happened at a given time and place for each politically constituted society, or whether it merely expresses the result or outcome of a more gradual social process, is a matter that has been persistently left in a half-light. We cannot therefore make any general statement as to whether those who have defended the idea of the social contract have viewed it as a historical fact, or only as an interpretation of the nature of the social bond.

Such is in general the doctrine of the social contract. A glance at the growth and history of the doctrine itself may serve to bring out more saliently the nature of the argument involved. The origin of the theory is to be found in the philosophy of the Greeks. It is associated more particularly with the speculative thought of the period during which the Greek city state — the organized form under which Athens and Sparta reached their greatest development — was falling into decadence. In the writings of Plato and Aristotle we find but scant sanction for it. The political thought of both of them was inspired by the ideal of the city state, whose importance was to them greater than, and antecedent to, that of the individual citizen. The latter, indeed, only existed in and through the state. The social bond with his fellows was an essential part of man's nature. "Man," runs the well-known Aristotelian dogma, "is a political animal." Society, therefore, being the primary consideration, and the individual existence being possible only by means of it, the conception of an individual dealing in obligations and privileges, as a subject of contract with society at large, was altogether foreign to the Platonic and Aristotelian system.

With the Greeks of the fourth and succeeding centuries, however, the political environment had altogether changed. The subversion of the city state by the Macedonian and Roman conquests led the Greek philosophers to turn aside from political speculation, and to look upon the political aspect of the individual as merely one of the accidents of his being. In the writings of the Epicurean school we find the idea that laws and duties imposed on the individual by any government, whether foreign or autonomous, are things which he accepts for his own well-being, entering thus into a kind of compact or understanding with the powers that be. On this foundation grew up the theory of the social contract. The system of the Roman law, one of whose greatest contributions to institutional development has been to bring into a clear light the conception of obligation by contract, supplied a further material with which to construct the completed theory.[1] Christianity, indeed, inculcating in its early teachings the doctrine that all civil society had been the outcome of human sin, and that it was the duty of the Christian to submit to the rule of temporal powers as a part of his abnegation of self, seemed at first to run counter to the supposedly equitable bargain of a social contract. Nevertheless in the polemics of the middle ages, during which the rival claims of the empire and the papacy supplied the basis of political controversy, a sort of meeting-point appears between the doctrine of a social contract and the early Christian conception of the nature of civil society. The advocates of the papal claim held that kings and princes in general, and hence the emperor among them, held their offices (under God's sanction) by reason of a covenant with the people, even as the elders of Israel covenanted with King David.[2] This view, connected presently with the earlier Greek philosophy, gave rise to a special form of contract theory in the idea of a compact made by all the people with one person, a contract between a king and his subjects. To this special form of the general doctrine the name of governmental compact[1] has often been given.

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[1] See in this connection David G. Ritchie, *Darwin and Hegel, with Other Philosophical Studies.* (1893.)

[2] 2 Samuel, v. 3.

2. Application made of the Theory by Hobbes, Locke, and Rousseau. It was in the seventeenth and eighteenth centuries, in consequence of the religious and civil upheavals by which the political institutions of Europe were moulded anew, that the theory of contract obtained its greatest prominence. Hobbes and Locke in England and Jean Jacques Rousseau in France became its chief exponents. A review of the contract theory as laid down by each will serve to show it in its completed form. Thomas Hobbes, sometime tutor to Charles II, and prominent among the writers of the seventeenth century for his works on moral and political philosophy, offers in his "Leviathan" (1651) a striking exposition of the contract theory. The foundation of his theory lies in his estimate of man's essential nature. Man, according to Hobbes, is an altogether selfish and self-seeking animal. The sole motive for his actions proves on analysis to be the wish to satisfy his own appetites and desires; even such a quality as benevolence is seen on examination to result from man's "love of power and delight in the exercise of it." Compassion is only "grief at the calamities of others from the imagination that the like calamity may befall ourselves." Man is therefore by nature anything but a social animal; indeed he finds "nothing but grief in the company of his fellows," all being equally rapacious and self-seeking. The state of nature is consequently a state of war, the war of each against all; it is a state of "continual fear and danger of violent death; and the life of man solitary, poor, nasty, brutish, and short." From this condition man is driven by evident necessity to join himself with his fellows under some common authority, universal submission to any form of control, however despotic, being preferable to the mutual warfare of the state of nature. In the contract which men thus make among themselves all agree to submit to a single authority, which Hobbes interprets to be that of a king or absolute sovereign. But the latter, from the nature of the case, though benefited by the contract, is not a party to it. Such a contract thus differs from the governmental compact referred to above in that the king, being no party to it, cannot break it. It becomes irrevocably binding on all the community as a perpetual social bond. In this way the theory is used by Hobbes as a defense of absolute monarchy, the philosopher appearing as the theoretical apologist of the Stuart despotism.

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[1] See W. W. Willoughby, *The Nature of the State* (1896), ch. iv.

Very different is the presentation of the contract by Hobbes's illustrious contemporary John Locke. With the latter the state of nature is not one of universal war; it is, however, inconvenient and unsatisfactory. There is in the first place the standing "want of an established, settled, known law, the 'law of nature' being obscured since men are biased by their interest as well as ignorant for want of study of it." Nor is there "a known and indifferent judge," nor, finally, an active power to punish those who contravene the law of nature. For these reasons, men are led to abandon the "freedom" of the state of nature, and submit to the restraint of civil society. In the contract which they make, however, the monarch to whom they agree to submit, is himself a party. The contract as presented by Locke does not precisely correspond to the governmental compact, since it not only establishes the authority of the monarch, but also joins the members of the community by mutual covenant into a body politic.[1] It differs on the other hand from the contract of Hobbes in that the monarch is a party to it, and holds his office only by virtue of his compliance with the terms of the contract. Should the king break these, the contract is dissolved. In this form the theory is made the basis of a system of limited monarchy, and Locke stands as the apologist of the English revolution of 1688. The charge of having endeavored to "subvert the original contract between king and people," which was the indictment of the Convention Parliament against King James II, shows the basis of Locke's later defense of the revolution which was embodied in his "Treatises on Government" (1690).

Strongly contrasted with each of these is the standpoint of the great French writer of the eighteenth century, Jean Jacques Rousseau. Rousseau's book, the "Contrat Social" (1762), may be taken as the exposition of the theory dominant in the eighteenth century. With Rousseau the state of nature appears as an era of almost idyllic felicity.[1] The simple savage endowed with a health and vigor as yet unimpaired by the enervating influences of civilization suffices easily for his own restricted felicity. To this hypothetical state of nature Rousseau appeals for the solution of the problems of civilized life in regard to education, morals, etc. As the numbers of the race increase, this primitive condition becomes no longer advantageous. The obstacles which injure man's preservation in the state of nature grow more powerful than the forces which each individual can employ to maintain himself in this condition. Man is thus driven to relinquish his "natural liberty," that rather illusory "umlimited right to everything he is able to obtain," and by a union with his fellows to substitute civil for natural liberty. To do this he is driven to find a "form of association which may defend and protect with all the force of the community the person and property of each associate and by which each, being united to all, yet only obeys himself and remains as free as before." This is the social contract, a covenant of each with all. The king or monarch (or governing body of any kind) is not a party to the bargain, nor is the tenure of office of the ruler or rulers one of the terms of the contract. The king is merely a commissioned officer who holds his position at the dictates of that general will (*volonté générale*) which emerges as the sovereign power in consequence of the contract. Any king is of course deposable if the general will demands it. With Rousseau the doctrine of the social contract, which in the hands of Hobbes was made a weapon of defense for absolutism, and with Locke a shield for constitutional limited monarchy, becomes the basis of popular sovereignty.

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[1] The late Professor Ritchie claimed that the customary contrast between Locke and Rousseau is erroneous, the essence of Locke's social contract being the incorporation of society and not the appointment of a king. See essay "The Social Contract Theory," *Political Science Quarterly*, 1891.

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[1] Rousseau's views on the state of nature are found in detail in his *Discours sur l'Inégalité.*

3. Criticism of the Theory. From the exposition of the theory, let us turn to the question of its criticism. Attacked even in the eighteenth century by David Hume,[1] it has undergone a series of assaults at the hands of the publicists of the nineteenth century, as the result of which it may be now looked upon as exploded. Jeremy Bentham says of it, "I bid adieu to the original contract and I left it to those to amuse themselves with this rattle who could think they needed it." J. K. Bluntschli, one of the most distinguished German writers on political science in the nineteenth century, pronounces the theory not only unhistorical and illogical, but even "in the highest degree dangerous, since it makes the State and its institutions the product of individual caprice."[2]

Of the arguments directed against the social contract, the most evident and the most unanswerable is that the theory has no foundation in history. There is no recorded instance of a group of savages, previously without any political organization or political ideas, deliberately meeting together to supply the defect. Nor is it rational to suppose that any such deliberate first creation of the state could have happened; for this presupposes in the minds of its founders the conception of social organization before any such phenomenon had existed. They must have known what a government was before they could make one. As against this it is urged that history does furnish us instances of what may be termed the formation of a social contract, not indeed among men hitherto ignorant of government, but among groups of people separated from the state under which they had lived, and desirous of forming a new organization by deliberate action. Most famous of these instances is the case of the Puritan emigrants of the Mayflower. The familiar document drawn up and signed by them while still on board ship runs, "We . . . do, by these presents, solemnly and mutually in the presence of God and one another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation." "When Carlyle objects," says Professor Ritchie, "that Jean Jacques could not fix the date of the social contract, it would at least be a plausible retort to say that the date was the 11th of November, 1620."[1] Further examples are found during the same era of American history in the Providence agreement (1636) and the plantation covenant of New Haven (1638). It has even been urged that the written constitutions of the United States and its component commonwealths are historical instances of social contracts. But in all of these cases we have at best not the institution of a state among a people hitherto devoid of political organization, but the establishment of a particular government by persons already accustomed to the rights and duties of civil society. If the social-contract theory merely meant that in some cases particular governments are established by joint and general action, it would be hard to contradict it.

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[1] Hume, *Philosophical Works* (Edinburgh, 1854), vol. iii, essay xii.

[2] Bluntschli, *Theory of the State*, bk. iv, chap. ix.

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[1] Ritchie, *Political Science Quarterly*, 1891.

It is, however, possible to abandon the doctrine of the social contract as representing a historical occurrence, and yet to adhere to it as expressing the proper interpretation of the relations between the individual and the state. Viewed in this light it is no longer a historical but an analytical conception. It proposes as the justification of the state a voluntary exchange of services between the individual and the political community. The individual renders obedience and receives protection. It is in this form that we find the contract doctrine maintained by many political philosophers of the early nineteenth century. Such for instance is the standpoint of Kant.[1] The contract, he says, is "not to be assumed as a historical fact, for as such it is not possible, but it is a rational idea which has its practical reality in that the legislator may so order his laws as if they were the outcome of a social contract. The latter becomes in consequence 'the criterion of the equity of every public law.'"[2] Yet even as an ideal of social relations, the contract doctrine has been assailed, one may say almost overwhelmed, with hostile criticism. The individual, it is argued, is joined to the state not by a voluntary conjunction but by an indissolvable bond. The relation is a compulsory one. Each of us is born into the state; we are part of the state and the state is part of us. The state is not a mutual assurance society, membership in which is a matter that the citizen may accept or reject. Nor is the true measure of our social duties to be found in the extent of benefit that we receive from society. Our common experience of the nature of the state indicates much that conflicts with the narrow view suggested by the *quid pro quo* of a contract relation. Patriotism — the sacrifice of the individual's interests to the claims of the community — we account one of the highest of virtues. We look to the state as the especial guardian of the poor and the helpless. We call upon it to act not for the present generation alone, but for the welfare of those which are to come. The state, in fine, stands in its ideal aspect for the collective moral effort of the whole community. The line of thought here suggested finds its extreme expression in what is called the "organic theory of the state," a doctrine that will be examined in a later chapter.

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[1] See Kant's treatise *On the Common Saying*, etc. A good exposition of Kant's views in regard to the nature of the state is given by Professor Paulsen, *Immanuel Kant*, New York, 1902, pp. 343-361.

[2] It is in this modified form that the doctrine of the social contract becomes the basis of the benefit theory of taxation; the individual is hereby called upon to contribute to the public needs not in accordance with his "faculty" or ability to contribute, but in accordance with the amount of benefit or protection that he receives. In practice either theory would tax the rich more heavily than the poor; but the fundamental conceptions of the relation of the individual and the state implied in the two theories are essentially opposed.

4. The Theory of Divine Origin. The importance of the social-contract theory has entitled it to a somewhat elaborate discussion. Of the other fallacious doctrines in question, the two principal ones, the theory of the divine origin of the state and the theory of force, may be more briefly mentioned. The theory of the divine origin, known in familiar form as "the divine right of kings," may now be regarded as entirely extinct in political theory. It belongs especially to the period of the sixteenth and seventeenth centuries. Originating after the great mediæval controversy of the Papacy and Empire had subsided, it represents the resistance offered by the constituted monarchical governments to the growing ideas of popular sovereignty. Its essential meaning is that each and every existing state represents an institution of deliberate divine creation. Under this theory the government, or one may say the monarch, since the doctrine was directed towards the defense of the monarchical system, represents a direct divine agency against whom no supposed principle of individual rights can be valid. In a certain sense it is of course very generally held that all human institutions represent the controlling power of the Deity. But the theory of divine right goes much farther than this. It assumes the Deity to have vested political power in a special way, and by special intervention, and to have seen fit to deny political supremacy to the mass of the community. Such works as the "Patriarca" of Sir Robert Filmer, a parasitic apologist of the later Stuarts, reflect the theory in its extreme form, the paternal power vested at the creation in Adam being here supposed to pass by descent to the kings and princes of Europe. The theory as such needs no longer a serious refutation. It has, however, been pointed out by several critics of this doctrine that it has left deep traces in the underlying political thought of European nations. The idea of kingship as having a peculiar divine sanction — the "divinity that doth hedge a king" — is by no means an extinct element in the thought of many people both in Great Britain and continental Europe.[1]

5. The Theory of Force. Finally, we may mention among the erroneous doctrines in explanation of the origin and meaning of the state the theory of force. Here, again, the same theory appears both as a historical interpretation of the rise of the state and as a rational justification of its being. Historically it means that government is the outcome of human aggression, that the beginnings of the state are to be sought in the capture and enslavement of man by man, in the conquest and subjugation of the feebler tribes, and, generally speaking, in the self-seeking domination acquired by superior physical force. The progressive growth from tribe to kingdom, and from kingdom to empire, is but a continuation of the same process. Such a point of view is frequent with the fathers of the church and the theologians of the middle ages, by whom the origins of earthly sovereignty are decried in order that its subordination to the supremacy of the spiritual power may be the more evident. Gregory VII wrote (A. D. 1080), "Which of us is ignorant that kings and lords have had their origin in those who, ignorant of God, by arrogance, rapine, perfidy, slaughter, by every crime with the devil agitating as the prince of the world, have contrived to rule over their fellow men with blind cupidity and intolerable presumption."[1]

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[1] See in this connection Walter Bagehot, *The English Constitution*, ch. iii.

In modern times we see much the same view advanced for a very different purpose in the earlier political writings of Herbert Spencer.[2] "Government," he says, "is the offspring of evil, bearing about it the marks of its parentage." With the churchmen the temporal power was defamed for the benefit of the spiritual authorities; with Spencer and the still more extreme writers of the "anarchistic" school, the maintenance of the rights of the individual man is the object pursued. We find the theory of force elaborated in detail by Marx, Engels, and the writers of the German socialistic group. Here the doctrine assumes a slightly different form. The growth of the state is to be attributed to the process of aggressive exploitation, by means of which a part of the community has succeeded in defrauding their fellows of the just reward of their labor. Existing governments represent merely the coercive organization which serves to hold the workers in bondage.[1] The socialist writers have no fault to find with the abstract existence of a state or coercive authority. Their objection is directed against the particular form of the present state, which they ascribe to its iniquitous historical origin. As against the theory of force in general it can with propriety be advanced that it errs in magnifying what has been only one factor in the evolution of society, into the sole controlling force. That government has in part been founded on aggression no one will readily deny. But as we shall presently see, its institution has owed much to forces of an entirely different character. Even a "population of devils," Kant has said, "would find it to their advantage to establish a coercive state by general consent."

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[1] Otto Gierke, *Political Theories of the Middle Age*, translated by Professor Maitland (1900).

[2] See *Social Statics* (1869).

The force theory has also played some part in political thought, not as a historical account of the rise of the state, but as a means of its justification. Stated in its crudest form, such a doctrine is equivalent to the proposition that might is right. "The individual," writes Jellinek, in elucidation of this point of view, "must submit himself to it since he perceives it to be an unavoidable force (*Naturgewalt*)." Bluntschli even maintains that the doctrine has "a residuum of truth, since it makes prominent one element which is indispensable to the state, namely force, and has a certain justification as against the opposed theory (that of contract) which bases the state upon the arbitrary will of individuals, and leads logically to political impotence."[1] But in plain matter of fact, and apart from the refinements of abstraction, the proposition seems hopelessly illogical. As was long ago pointed out by Rousseau, the right that is conferred by might can reasonably be said to last only as long as the might which confers it. Submission to the state would therefore only be warranted as long as one was unable to do anything else than submit. The amount of justification involved in this is less than nothing.

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[1] The historical process of dispossession is outlined in the *Manifesto of the Communist Party,* written by Marx and Engels in 1848.

The theory of force, as a defense of the governmental authority, assumes quite a different aspect at the hands of Ludwig von Haller. Writing at a time when the great wars of the Revolutionary and Napoleonic era had overwhelmed the sanguine outlook of the eighteenth century enlightenment in the disillusion of a devastated continent, he represents a natural revulsion from the deification of popular sovereignty towards the principles of monarchical authority. With Haller government is based upon "the natural law that the stronger rules." But the principle involved is one of benevolence, not of repression. The fundamental bond of human relationship and social cohesion is the dependence of the weak upon the strong. Obedience is given on the one hand, protection on the other. We see this in the relation of parent and child, husband and wife, master and servant. This is the true relation of the prince and the subject. The position is not one created by a voluntary act; it is not a contract; it is a part of the fundamental order of the universe. "We might as well say," Haller contends, "that there is a contract between a man and the sun, that he will allow himself to be warmed by it." This universal law of the submission of the weak to the strong is thus made the basis of a theory of absolute monarchy and unlimited submission. Though clothed in a benevolent form it amounts to the assertion that sovereign power is the disposable property of the prince. As such it needs no refutation.[1]

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[1] *Theory of the State*, bk. iv, chap. viii.

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CHAPTER III

THE TRUE ORIGIN OF THE STATE

1. The Historical or Evolutionary View of the State. — 2. The Patriarchal and Matriarchal Theories. — 3. Course of Development: the Aristotelian Cycle. — 4. Military and Economic Factors. — 5. Some General Features of Political Evolution.

1. The Historical or Evolutionary View of the State. The fallacious theories presented in the last chapter may be considered to prepare the way for a more correct estimate of the origin of the state. The view held by the best modern writers may be described as the historical or evolutionary theory of the state. By this is meant that the institution of the state is not to be referred back to any single point of time; it is not the outcome of any single movement or plan. The state is not an invention: it is a growth, an evolution, the result of a gradual process running throughout all the known history of man, and receding into the remote and unknown past. "The proposition that the State is a product of history," says Professor Burgess, "means that it is a gradual and continuous development of human society out of a grossly imperfect beginning through crude but improving forms of manifestation towards a perfect and universal organization of mankind." It is thus altogether erroneous to think of man as having in the course of his evolution attained to a full physical and mental development, and then looking about him to consider the advisability of inventing a government. We might as well imagine man, mentally and physically complete, deciding that the time had come for the invention of language, in order to satisfy his growing need of communicating with his fellows. Just as language has been evolved from the uncouth gibberings of animals, so has government had its origins in remote and rudimentary beginnings in prehistoric society. Man's capacity for associated action and social relationships of all kinds has proceeded by a gradual development parallel with that of his physical and intellectual aptitudes.

2. The Patriarchal and Matriarchal Theories. This general idea or principle of a gradual and progressive evolution seems clear enough. Yet if we attempt to go further and map out the stages of man's social development, the most serious difficulties are encountered. The simplest and earliest method of offering a historical account of the genesis of social amalgamation was found in taking the family to represent the primal unit of social history. The control exercised by a father over his children, which presently expands into the control of a patriarch over his descendants, was supposed to represent the origin of human government. It indicated at the same time a justification of the state as proceeding from the purely "natural" institution of the family. First a household, then a patriarchal family, then a tribe of persons of kindred descent, and finally a nation, — so runs the social series erected on this basis. This attempt to refer the institution of government to the authority of an original father of a family is known as the patriarchal theory. It has sought to defend itself by reference partly to historical instances, partly to current facts. We find it as early as in the writings of Aristotle, the first book of whose "Politics" contains a statement of the theory. "The family," says Aristotle, "arises first; . . . when several families are united, and the association aims at something more than the supply of daily needs, then comes into existence the village. . . . When several villages are united in a single community perfect and large enough to be nearly or quite self-sufficing, the state (πόλις) comes into existence." Since Aristotle's time the same view has been presented by a variety of writers as offering a valid account of the origins of political institutions. The case of such communities as the nomadic tribes of central Asia is adduced in proof of the correctness of the view.

The historical researches of the nineteenth century, however, have rendered it impossible to accept the patriarchal theory as offering a universal or final solution of the problem of the origin of government. The critics of this theory have conclusively shown, in the first place, that the patriarchal régime has not everywhere appeared as the foundation of later institutions, and, in the second place, that even where it has appeared, it has not of necessity been the oldest form of social regulation which may be traced in prehistoric times. Such has been the substance of the results reached by J. F. McLennan and others who have sought to substitute a rival hypothesis under the title of the matriarchal theory. By this is implied an altogether different social arrangement from that suggested by the supposition of a primitive family. Previous to the patriarchal or family group men are found living in "hordes" or "packs," in which the usual relations of husband and wife do not exist. Relationship, instead of being traced through the father, is traced in such a primitive society altogether through females. The nature of this relationship may be understood by referring to the account given by Mr. Edward Jenks in his recent "History of Politics."[1] Mr. Jenks describes as typical of primitive society the arrangement still existent among the natives of Australia and the Malay Archipelago. "It is the custom," he says, "to speak of the Australian and other savages as living in tribes; . . . it would really be better to call it the 'pack,' for it more resembles a hunting than a social organization. All its members are entitled to share in the proceeds of the day's chase, and, quite naturally, they camp and live together . . . [but] the real social unit of the Australians is not the 'tribe' but the *totem group*. . . . The *totem group* is primarily a body of persons distinguished by the sign of some natural object such as an animal or a tree, who may not intermarry with one another. 'Snake may not marry Snake. Emu may not marry Emu.' This is the first rule of savage social organization. . . . The other side of the rule is equally startling. The savage may not marry within his totem, but he must marry into another totem specially fixed for him. More than this, he not only marries *into* the specified totem, but he marries the whole of the women of that totem in his own generation. . . . Of course it must not be supposed that this condition of marital community really exists in practice. As a matter of fact each Australian contents himself with one or two women from his marriage totem." Under such a system, "as far as there is any recognition of blood relationship at all it is through women and not through men." Several writers on the matriarchal theory have considered that in this primitive stage of society not only is descent traced through the mother, and property passed in the female line, but the social group is ruled by the women, not the men. Such a condition of things is actually found, for instance, among the Hovas of Madagascar. But as a hypothesis of a universal social arrangement it has been quite refuted.

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[1] E. Jenks, *History of Politics* (1900).

The exponents of the matriarchal theory — understood here in the narrower sense of a system of relationship and not of female rule — present it as the universal primitive condition of mankind. Out of it, they tell us, the patriarchal system has emerged through the adoption of settled pastoral and agricultural habits in place of the purely wandering or hunting life of primitive man. That such a system of tribal relationship as is here described exists in some savage communities of to-day, and has often existed in the past, seems beyond a doubt. There does not, however, seem any adequate proof for regarding it as the universal and necessary beginning of society. Indeed social history does not seem to lend itself to so simple a formula of successive development. No single form of the primitive family or group can be asserted. Here the matriarchal relationship, and there a patriarchal régime is found to have been the rule, — either of which may perhaps be displaced by the other. Indeed one has to admit the fact that there is no such thing as a "beginning" of human society. All that can be asserted is that in the course of time the monogamic family tended to become the dominant form, though even until to-day it has not altogether supplanted other forms of organization. This does not say, however, that paternal control of the family is to be looked on as the one necessary beginning of government and social control. For it must have happened in many instances that social authority of a rudimentary sort existed where as yet the monogamic family was unknown.[1]

3. Course of Development: the Aristotelian Cycle. The earlier stages of the social evolution seem therefore to lend themselves but poorly to any scheme of orderly and uniform progression. Much the same difficulty meets us in trying to reduce the successive stages of historical development to any general plan. It is clear that between the rudimentary form of social control exercised by the chief of a primitive tribe, and the complex and effective organization of a modern civilized government, a vast historical evolution is apparent. But to reduce the stages of this progression to a necessary coördinated sequence appears an impossible task. The same goal has been reached by different paths; not all political communities have passed through the same phases of development. What has been the result of an internal evolution in some has been effected in others by imitation and adaptation of what already existed elsewhere. Democratic government has been attained in various modern states by quite distinct historical stages.

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[1] "Of all these endless controversies in reference to relationship and marriage, what seems to me most evident is that the primitive family has assumed various forms, here monogamic, there polygamic, elsewhere polyandric, sometimes exogamic, sometimes endogamic, often more authoritative, sometimes less so than it has become later." G. Tarde, *Les Transformations du Droit*, chap. iii.

Notwithstanding these considerations, the attempt to reduce political progress to the formula of a prescribed course of development has often been made. At the very outset of political speculation we have the famous "cycle theory" of Plato, and a theory of progressive change laid down by Aristotle. Plato thought that the natural life of a state must move through a definite course of political changes. Aristocracy, the rule of the best, passed into timocracy, — the government of honor or rule of the military class. This changed to oligarchy, then to mob rule, and finally to tyranny.[1] The views of Aristotle will be considered in some detail in a later chapter.[2] While criticising Plato's opinions and pointing out that successive political revolutions do not always follow the same order of development, Aristotle nevertheless considers the transition from monarchy to oligarchy, from oligarchy to tyranny, and from tyranny to democracy to have been the normal or usual nature of Hellenic political change.[3] However applicable this may have been to the history of the Greek city states of the seventh and following centuries before the Christian era, it cannot be accepted as any general or universal key to the political evolution of later ages.[4]

4. Military and Economic Factors. Equally attractive and no less futile is the attempt to ascribe the evolution of the modern state to the operation of a single, or at any rate a dominant, motive power. Of this an illustration is seen in the "History of Politics," already mentioned. "The origin of the state, or political society," says Mr. Jenks, "is to be found in the development of the art of war. . . . There is not the slightest difficulty in proving that all political communities of the modern type owe their existence to successful warfare."[1] It is of course quite true that all modern political communities have had to fight for their existence. It is also true that certain aspects of their organization — standing armies, conscription, etc. — bear witness to the importance of the function of external defense. But it is not to be supposed on this account that the type assumed by modern political communities is to be ascribed entirely to the exigencies of their military life. Contrast with this the standpoint of the Marxian socialists of Germany, who tell us that the development of government, along with that of all social institutions, is to be attributed solely to economic factors. The state represents merely the organization by which the property-owning class enjoys the fruits of the laborer's toil.[2] In each of these cases a single factor in the history of the modern state is unduly magnified to appear as the paramount force in its development.

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[1] Plato, *Republic*, bk. viii, § 545. See also Dunning, W. A., *History of Political Theories* (1902), chap. ii.

[2] See part i, chap. vii.

[3] Aristotle, *Politics*, iii, chap. 15.

[4] See in this connection Warde Fowler, *The City-State.* 1893.

5. Some General Features of Political Evolution. To trace the rise and growth of any particular state, and the different phases of the evolution of its institutions, is the task of history, not of Political Science. Speaking of the state in general it is impossible to predicate any universal course of development or any necessary series of forms which it must assume. Looking, however, at the present stage that has been reached in the growth of political institutions, we may nevertheless indicate some of those general characteristics which the modern state has acquired and which differentiate it so entirely from rudimentary or primitive governments. In the first place there has been, speaking broadly, a progressive increase in the extent of territory occupied by a single state. At the dawn of history, mankind is found grouped in vast numbers of small political communities. On the map of the world to-day we find the greater part of the inhabited territory controlled by a relatively small group of vast states. Of the 52,300,000 square miles which make up the land surface of the globe the British Empire covers 11,516,000, the Russian Empire 8,660,000, the Chinese Empire 4,277,000, and the United States 3,567,000. True, this widening area of the territorial political unit has not been literally continuous. The Roman Empire was vastly greater than such small modern states as Greece or Roumania. But the tendency, though at times interrupted or over-accelerated, is nevertheless a leading factor in the history of the world. In the second place we may note the constantly increasing fixity and certainty of the action of the state. The rule of a primitive government, especially if spread over a relatively large area, is uncertain and irregular. Offenses against its authority may or may not meet with retribution, and when it punishes it acts with a vengeful severity arising from its weakness. In many cases its sway is little more than nominal. But the progressive development of political institutions has given to the state an organization which insures to it a definite and regular action. A third essential feature in the development of the state is the growth of political consciousness. The earlier stages of social union are largely intuitive and unconscious; nor does there ever come a single point of time at which collective action suddenly becomes deliberate. We have seen that the assumption of such a step in political development was one of the errors of the social-contract theory. But in comparing rudimentary government with modern civilized government we can observe the essential difference that exists in this respect.

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[1] *History of Politics*, chap. xiii.

[2] Manifesto of the Communist Party, 1848.

Of the other broad features of the development of social structure, the separation that has been effected between the religious and the political aspects of society may be especially noted. The early forms of government were theocratic. The functions of priest and king were intermingled or closely allied. The divine law was presumed to constitute the sanction behind human enactments. Such is the system on which rested the theocracy of the Jews. In the modern state, however generally it may be admitted among the citizens that legislation ought to be based on the ethical principles of Christianity, the interpreters of the divine law, in the form of the priesthood, are not placed in a position of civil authority. The guidance of the spiritual and the political life of the community is in different hands. The nature of the earlier form of the state is seen in the survival of established or partially established churches in Great Britain and some other European countries. The formerly prevalent practice of invoking the authority of the state to suppress heresy and unbelief rested on the same conception of organization. The progressive separation of church and state has been one of the evident results of political evolution.

The growth of democratic government, the participation of the great mass of the people in political control, is the most important feature in the development of the state. Democratic government does not, of course, exist in all the great civilized states, but in the chief of them — either in the shape of a republic or under the more or less nominal semblance of monarchy — it has become an accepted fact. The progress of democracy has not, of course, been continuous and unbroken. We have but to compare the republic of Athens with the principalities of the dark ages, or with France of the eighteenth century, to see that the development of self-government has not moved in a continuous advance. But it is hardly to be denied that the principle of democratic rule has now become a permanent and essential factor in political institutions and that it alone can form the basis of the state of the future.

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CHAPTER IV

THE SOVEREIGNTY OF THE STATE

1. Analysis of the Conception of Sovereignty; Meaning of Law and Right. — 2. The Location of Sovereignty in Existing Governments. — 3. Criticism of the Doctrine of Sovereignty; Sir Henry Maine's Objections. — 4. Theory of Political Sovereignty. — 5. Criticism. — 6. Dual or Divided Sovereignty.

1. Analysis of the Conception of Sovereignty; Meaning of Law and Right. Having considered in the preceding chapters the general idea of the state as an organized community occupying a definite territory, it is next necessary to make a further analysis of the organization itself. This will involve the discussion of the relations existing between the individual citizen and the state as a whole. The two central points around which the discussion of the present and the succeeding chapter will turn, are those of the sovereignty of the state, and the liberty of the individual. These two ideas, which appear at first sight to be mutually contradictory, will be shown to be not only reconcilable, but complementary and correlative to one another.

The question of the sovereignty of the state has long been a vexed topic of political discussion, and one that has given rise to the most serious difficulties and misunderstandings. The proposition that the state is absolutely sovereign over the individual has proved itself a stumbling-block and a rock of offense to the student of political theory. Take, for example, the enunciation of the principle of sovereignty given by Professor Burgess. "I understand by it," he says, "the original, absolute, unlimited, universal power over the individual subject and all associations of subjects." This is a hard saying and one calculated to call forth at first sight a most emphatic contradiction. It seems to sanction the tyranny of the state, and to involve the sacrifice of individual rights. A nearer analysis of the proper meaning to be attached to the sovereignty of the state ought to rob it of all offensive connotation. What is meant is simply this. The state is an organized community. It comes into existence when the relations of control over and obedience from the individual person are established. This obedience may or may not receive the approval of the individual rendering it. The *fact* of obedience is all that is needed in order that the state may be said to exist. Somewhere within the state there will exist a certain person or body of persons whose commands receive obedience. The commands may be just or unjust, morally speaking, and the persons in power may be put in a position to issue them, either by general consent or by the use of physical force. But in either case they are able to make their commands good by actual coercion. Unless there is such a body there is no state. The commands thus given are called laws. A law, then, is a command issued by the state. Can there, then, be any limit, any legal limit, to the sovereignty, or legal supremacy, of the state? Obviously not, for such a limit would imply a contradiction in terms. A legal limit must mean a limit imposed by a lawgiving authority. Now the lawgiving authority is the sovereign power of the state, and any limits it might put on its own power would be removed as soon as it saw fit to remove them. The lawgiving power of the lawgiving body is therefore of necessity unlimited. The state, in other words, is legally sovereign. Looked at in this light the matter simply resolves itself into an equation in terms.

An examination of the fundamental definition of law and sovereignty laid down by the English jurist John Austin[1] may make still clearer this point of view. "If a determinate human superior not in the habit of obedience to a like superior receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent." According to this, then, a state (or "society political and independent," as Austin calls it) is a community in which such obedience is given and received. The fact of rule and obedience is the test of the existence of a state. A law is a command calling for such obedience. We must carefully note, too, the conception of a right, a legal right, which will follow from these premises. It will mean any privilege or immunity enjoyed by a citizen as against any of his fellow citizens, granted by the sovereign power of the state and upheld by that power. This, it will be seen, is altogether different from a right in the ethical or moral sense. Before the French Revolution, for example, under the state existing in the eighteenth century, the feudal lord had a "right" to collect most oppressive dues from his inferior. Similarly a despot might grant to one of his underlings the "right" of life and death over the people of a subjugated province. It will follow that in the organization of the state the individual can have no "rights" against the state itself. For this, since it is the state which creates a legal right, would involve a contradiction in terms. It is to be observed that as thus understood, the conception of sovereignty, law, and right is altogether divorced from morality and ethics.

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[1] John Austin (1790–1859), the chief English writer on jurisprudence of the nineteenth century, is to be regarded as the founder of the analytical school, whose views have exercised a paramount influence on legal thought in England and America.

The misunderstanding of this restricted sense in which the state is sovereign and law is unlimited in its power leads to an altogether fallacious form of objection. Surely, it is urged, the state has no right to interfere with such things as the religion and private life of the individual? Surely there are limits to the province in which the commands of the state may intrude? There are assuredly such limits in the moral sense; certainly most persons would think it morally wrong for the state to dictate as to the religious creed of the individual. But this does not imply any legal limit to the jurisdiction of the state. The sovereign body of the state can be under no legal restriction as to its interference in religion or any private matter. If it were under such a limitation then it would not be a sovereign body; the sovereignty would lie in that person or persons in whose power it lay to assign and mark off these limits. The same answer is to be made to the various other attempts to put a "limit" on the extent of sovereign power. Bluntschli, for instance, tells us that "the state as a whole is not almighty, for it is limited externally by the rights of other states, and internally by its own nature and by the rights of its individual members."[1] Bentham claimed that the sovereignty of the state was limited by its treaties with other states. But each of these "limits" is of an ethical, not a legal character. Legally speaking the state *is* almighty.

The misunderstanding so easily engendered here is heightened by the ambiguity of some of the terminology employed in this connection. The word right has both its moral and its legal sense. In the former application it extends over the whole field of conduct, and refers to all those actions and forbearances which it is our moral duty to perform; in the legal sense it refers only to those actions or forbearances the performance of which is rendered compulsory by the coercive power of the state. Similarly the word sovereignty is not only used in the sense of legal supremacy, but has also another connotation. It is used, that is to say, in a purely nominal sense, to indicate the titular supremacy of a monarch. King Edward VII is the sovereign of the United Kingdom of Great Britain and Ireland, but this is only titular and not legal sovereignty. The distinction is sufficiently obvious to need no further explanation.

2. The Location of Sovereignty in Existing Governments. The nature of sovereignty and law as thus described may be further illustrated by examining its actual application to the case of some of the chief states of the world. The example most easily understood is that of the British Empire. Here the sovereign legal authority lies in the Parliament,—the word Parliament having of course its technical legal meaning of king, lords, and commons. Parliament is an absolute legal sovereign. Every law that it sees fit to make is, *ipso facto*, a valid law. There is no (legal) restriction on the extent of its jurisdiction. No British court can question the validity of a statute duly passed by Parliament. It is (legally) quite unrestrained by custom, by the legislation of the past, or by any of the written documents (Magna Carta, etc.) which may be said to form part of the British Constitution. No individual citizen has any (legal) "rights" which the sovereign power of Parliament could not annul; no local body or colony has any powers of self-government which an act of Parliament could not abolish.

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[1] *Theory of the State*, bk. vii, chap. i.

The example of the British Empire seems to show the legal supremacy of the state in simple form. The case of the United States, though more complex, is reducible to the same elements. Here, at first sight, the presence of the sovereign body is not so apparent. The powers of the government of any state of the Union — either executive or legislative — are powers of limited legal extent. Similarly the powers of the federal government — of the President and of Congress, or of both together — are powers of limited extent. The Congress is not legally empowered, as is the British Parliament, to make any law it may think proper, and the courts can question the validity of any statute, either state or federal, which transcends the legal powers of those who made it. For example, a federal law imposing an export duty would not be legally binding. But all this is only to say that neither the President nor the Congress nor the state government is the body invested with the sovereign power of the state. The supreme authority lies elsewhere. It is in that body which has power (legally) to make any law it wishes, that is to say in the body which has the legal right to amend the Constitution of the United States. It is true that this body, consisting of a two-thirds majority of Congress, or a special convention, with the ratification of three fourths of the state legislatures or of special conventions,[1] is not in permanent session as a united governing body. But it is clear that theoretically at any rate it exists, and may be looked upon as having a legal supremacy as complete as that of the British Parliament. In like manner in the case of France, neither the President nor the Chamber of Deputies nor the Senate has unlimited legal competence. The powers of all of them are restricted by the "constitutional laws" of the French Republic. But the Senate and the Deputies may be fused together into a joint session or national assembly, in which capacity they may amend the constitution and are legally supreme.

3. Criticism of the Doctrine of Sovereignty; Sir Henry Maine's Objections. Such is in the main the conception of sovereignty and law which is particularly associated with the modern English school of jurists, the analytical school, as it is often called. It may be considered on the whole the most satisfactory basis for an analysis of the political state. It has, however, met with severe and searching criticism, and has by no means received a universal acceptance. It is only reasonable, therefore, to present in connection with it some of the chief points of attack. The objections raised against it are directed to show that it is only of a formal and abstract nature, that it is inadequate in that it does not really indicate the ultimate source of political authority, and that it presents an erroneous conception of the nature of law.

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[1] "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments which in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by Congress." *Constitution of the United States*, Art. V.

The first of these objections to the Austinian theory is especially urged in the criticism offered by the English jurist Sir Henry Maine in his Oxford lectures on the "Early History of Institutions."[1] From his seven years' experience as legal member of the council for India, Maine was brought in contact with a civilization of an essentially different character from the environment of English legal institutions which had been the basis of Austin's work. In Eastern countries immemorial custom reigns supreme. The idea of deliberate statutory enactment is alien to the oriental mind, and the most ruthless of Eastern despots finds his power controlled by the barriers of ancient usage and religious awe. Maine was, therefore, led to question whether there is "in every independent political community some single person or combination of persons which has the power of compelling the other members of the community to do exactly as it pleases." The presumption that every community, except during temporary intervals of disturbance, contains this individual or collegiate sovereign "as certainly as the centre of gravity in a mass of matter," seemed to him unwarranted by historical or actual fact. Particularly is this the case with communities of the oriental type. Maine instances the example of Runjeet Singh, the despot of the Punjaub, "the smallest disobedience to whose commands would have been followed by death or mutilation." In spite of this ruler's extensive power he never "issued a command which Austin would call a law. . . . The rules which regulated the lives of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals." The inevitable conclusion seems to be that the conceptions of sovereignty, state, and law adopted in the Austinian jurisprudence are inapplicable to communities of this description. But it is not only in regard to oriental society that Maine finds Austin's analysis inadequate. Even in the world of western civilization it is only true as the result of a process of abstraction which "throws aside all the characteristics and attributes of government and society except one," namely, the possession of force; this explanation of political power by reference solely to a single attribute disregards at the same time "the entire history of the community, . . . the mass of its historic antecedents, which in each community determines how the sovereign shall exercise, or forbear from exercising, his irresistible coercive power."

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[1] See *Early History of Institutions*, lectures xii and xiii.

The nature of this objection had, indeed, been in some measure anticipated by Austin himself. In order to cover all those cases of usage in which not the direct command of the sovereign but dictates of customary procedure obtained sway, he laid down the maxim, "What the sovereign permits he commands." The application of this doctrine may be best seen in the case of the English common (or customary) law. This is a body of regulations never expressed in the form of statutes issued by the sovereign Parliament, but existing from ancient times, and constantly modified and expanded by the interpretation of the courts. It would be quite wrong, Austin argues, to hold that the existence and continuance of this body of law is any indication of a limitation of the sovereign power of Parliament. For since the latter is admittedly competent to alter or abrogate the common law as it sees fit, the continued existence thereof is to be viewed as virtually by command of Parliament. This argument is undoubtedly true in reference to the legal validity of the common law. The attempt, however, to apply it to such cases as that of the Punjaub despot seems entirely erroneous. For in this instance the sovereign has no alternative but to "permit" what he cannot alter. Only an exaggeration of terms could convert this into sovereignty. On the same ground any one might "permit" the law of gravitation to continue in force.

It may perhaps reasonably be held that Austin's analysis is applicable to modern civilized states, but inapplicable to half-organized or primitive communities. Even in the case of civilized states, it is true that the theory is in a certain sense an abstraction. "It is true," says Sir James Stephen, in speaking of the theory of sovereignty,[1] "like the propositions of mathematics or political economy, in the abstract only. That is to say, the propositions which it states are propositions which are suggested to the imagination by facts, though no facts completely embody and exemplify them. As there is in nature no such thing as a perfect circle, or a completely rigid body, or a mechanical system in which there is no friction, or a state of society in which men act simply with a view to gain, so there is in nature no such thing as an absolute sovereign." With these limitations the Austinian theory may be looked upon as substantially correct. Its application is to be viewed as limited to communities definitely organized. The analysis of political power which it offers is not meant as an explanation of the ultimate source, the first cause, of authority,[1] but merely intended as a universal abstract formula, indicating the method of its operation in the modern world. To accept the doctrine in this sense, is of course necessarily to restrict the connotation of the terms state and law. The term state will include only communities possessing the requisite finality of organization, and fixed relations of command and obedience. A law will connote only a command issued, either directly or indirectly (through deliberate refusal to contravene an established usage) by the sovereign organization of the state. What is thus lost in width of connotation will be gained in precision and significance.

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[1] *Horæ Sabbaticæ*, second series, chap. i. The author is speaking of the theory as laid down by Hobbes, but the remarks apply equally well to the more modern form of the doctrine.

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[1] "The question who is the legal sovereign," says Bryce, "stands quite apart from the questions why is he sovereign, and who made him sovereign. The historical facts which have vested power in any given sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which law is concerned, and belong to history, to political philosophy, or to ethics; and nothing but confusion is caused by obtruding them into the purely legal questions of the determination of the sovereign and the definition of his powers." *Studies in History and Jurisprudence.*

Many authors prefer, however, to widen the terms state and law, in order to meet Maine's criticism, and to include the oriental or other communities whose political cohesion does not correspond to the Austinian analysis. Woodrow Wilson,[1] for instance, presents a conception of law which does not identify it with a definite command, but endeavors to include in it those customary usages which have become of binding force. "Law," he says, "is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of government." Of these rules deliberate enactment is only one of the contributory sources. They arise in part from long standing custom "shaped by the coöperative action of the whole community, and not by any kingly or legislative command." Among the other sources of law are the rules of conduct dictated by religious belief, and the decisions of those who adjudicate upon the law already existing and thus expand its meaning. The view here adopted by Professor Wilson is intended to harmonize the analytical account of law with the criticism offered by Sir Henry Maine. But it is perhaps open to question, whether in the case of civilized states the maxim "what the sovereign permits he commands" will not bring the sources of law above mentioned within the sphere of the Austinian formula.

4. Theory of Political Sovereignty. In addition to the criticism of the Austinian theory of sovereignty thus indicated, exception has been taken to it upon a somewhat different ground. The conception of legal authority, it is argued, though undeniable as far as it goes, does not go far enough; while indicating the person or body of persons legally competent to issue sovereign commands to the rest of the community, it does not really trace out the ultimate repository of political power. In a despotic monarchy, the will of the monarch may be the sole lawful authority, but the monarch himself may be merely the pliant tool of a cunning priest or dominating vizier. In countries with representative government, the elected governing body may have or seem to have a temporary legal control, but what are we to say of the general body of electors, whose will they represent, and from whom they derive their authority? Is it an adequate explanation of political cohesion and obedience to stop short of the legal supremacy of a king or legislature, whose power may be nominal, illusory, or delegated, and to refuse to recognize the real and paramount source of authority which lies behind it?

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[1] *The State*, chap. xiv.

On these grounds several writers have recently sought to amend the Austinian theory by appending to the conception of pure legal sovereignty that of real, or "political sovereignty."[1] Their intention is not to set aside the result of Austin's analysis, but merely to draw attention to the fact that it does not seem to offer a complete explanation of the nature and location of supreme political power. "Behind the sovereign which the lawyer recognizes, there is," says Professor Dicey, "another sovereign to whom the legal sovereign must bow." Professor Sidgwick illustrates the point involved by constructing hypothetical cases in which the ultimate political power is clearly not in the hands of the legal sovereign. "An irresponsible dictator appointed by a popular assembly for a term of years and not desiring reappointment" might be said to be legally and actually sovereign. But should he be anxious for reappointment, then the assembly to whose wishes he must bow becomes the paramount political influence, and his legal sovereignty is no longer the final seat of actual power. Or let us "suppose that a monarch habitually obeys a priest, not from fear of the extra-mundane penalties threatened by the latter, but from fear of finding it difficult to obtain obedience from his subjects if they believe him to be a special object of God's anger — we shall agree that he no longer possesses completely sovereign power." Following upon this line of argument we might well expect to find that the legal and the political sovereigns would but rarely coincide. In one state the priesthood, in another the military or landed classes, in another the personal entourage of the king or the predominant influence of a metropolis, might supply the real motive power that controls the public administration.

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[1] For the theory of political sovereignty the student may consult A. V. Dicey, *Law of the Constitution;* David G. Ritchie, *Principles of State Interference*; Sidgwick, *Elements of Politics*, chap. xxxi, and M'Kechnie, *State and Individual*, chap. ix, x. All of these authorities consider the distinction between legal and political sovereignty both tenable and valuable.

Here it might well be suggested that the sovereign political power would in many cases lie with the general mass of the people, or at any rate with the general mass of voters, who constitute in democratic countries about one fifth of the entire population. Austin himself, in this particular, fell into an amazing error in that he attempted to attribute not the political but the legal sovereignty itself to the body of the electorate. The fallacy[1] is here obvious. For although the voters are empowered by law to elect members of the legislature at stated intervals, they have (legally) no power of political action beyond this. Under most governments they cannot pass a law or negative measures of the legislature. In Great Britain, for instance, the Parliament (legally speaking) would be perfectly competent to pass a law declaring its own existence permanent and robbing the voters of their electoral privileges. Only in a country where the system of the initiative and the referendum[2] were made obligatory and universal could the electors be said to be legally sovereign. But without falling into this confusion whereby Austin mars the precision of his own system, it may be argued with much plausibility that the ultimate political sovereignty rests with the electorate. Much, however, may be advanced against this view. Is it not quite conceivable that the voters themselves may be under the dominance of a priesthood, or practically under the dictates of the land-owners or aristocracy or some particular class? In such cases the political sovereignty would have to be traced a step beyond the electorate. Is it not, moreover, to be supposed that the electorate may be largely influenced by the other four fifths of the nation, who constitute the non-voting class?

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[1] Professor Sidgwick in an appendix to his *Elements of Politics* demonstrates the absurdity of Austin's position.

[2] See part ii, chap. iv, below, Judiciary and Electorate.

It does not seem to follow that the voters of a democratic country *always* and *of necessity* represent the final and ultimate source of authority.

5. Criticism. Indeed, the more one searches for this final authority the more it seems to elude one's grasp. At its first statement the idea of a political sovereignty appears eminently reasonable. On closer examination it becomes a sort of political "first cause," and is as unfindable in the domain of politics as in that of physics. The moment one passes from the dry certainty of the Austinian conception of legality, all is confusion. The particular set of persons in a modern state who are invested with unlimited law-making power are a definite and findable body. The particular person, or set of persons, whose will is in reality supreme, fades upon analysis into a vague complexity.

Professor Ritchie and others have sought to avoid this difficulty, by laying down the theory that the ultimate repository of political power is always found in the mass of the people. By whatever routes it is traced, whether directly through electoral power, or indirectly through influence, intimidation, or potential rebellion, the final source of authority is here to be discovered. "The people" possess the physical power. In the last resort — the appeal to force — they are bound to prevail. Any form of rule to which they submit exists therefore only by virtue of their tacit consent. We have thus a theory of popular sovereignty carried to an extreme point. Such a theory does not content itself with saying that the people, the majority of the people, *ought* to possess the supreme power, but that in all cases they actually do possess it. Having the physical superiority which would enable them if sufficiently provoked to annihilate the existing government, there must always be limits to the extent of coercion that they will suffer. Obedient as they may be within these limits, they are in the last resort the masters. The consent by which they permit the existence of the government, is a tacit, and perhaps unconscious, acquiescence rather than the explicit formula of contract that was present to the minds of Rousseau's citizens; none the less it is true that they do give this consent, and that it is the real universal basis of political sovereignty. "The Czar of all the Russias," says Mr. Ritchie, "rules by the will of his people, as much as does the executive of the Swiss Federation." [1]

Attractive as is such a theory of popular sovereignty, it rests upon grounds essentially fallacious. It assumes that the superiority in actual physical force must of necessity rest with the mass — the majority — of the people. To suppose this is to leave altogether out of sight the question of military equipment, organization, and mutual understanding. A nation of a million un-armed men could easily be overawed by a force of a hundred thousand soldiers equipped with modern weapons and acting as a disciplined unit. Because a hundred convicts " acquiesce " in the control exercised by a dozen armed sentinels, it cannot be argued that the power of the sentinels rests either immediately or ultimately upon the consent of these convicts. Whatever be the proper interpretation of the political cohesion of modern Russia, it is at least conceivable that the support extended to the autocracy by the vast army in its pay may have as much to do with its maintenance as the good-will of the people at large. It seems evident upon examination that the numerical majority is not of necessity always the stronger power. It becomes so only in proportion as it enjoys the advantages of organization, equipment, and ability to act on a preconcerted plan. Hence in order to make the theory of political sovereignty stand upright it is necessary to again shift the ground and to claim that the ultimate sovereignty lies not with the mass of the people, nor with the numerical majority, but with the strongest group of persons trained to act together. But since a group is usually trained only to act together in a prescribed way, and at the dictates of a particular person or set of persons, it is clear that it is not the collective will of this armed force itself which exercises the supreme control, but that of the person or persons whom they are individually trained to obey. Thus the search for ultimate sovereignty relapses into the same vagueness as before.

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[1] Professor Ritchie includes in the sources of political power all those influences, historic and actual, which contribute to the present disposition and opinion of the governed. "The ultimate political sovereignty is not the determinate number of persons now existing in the nation, but the opinions and feelings of these persons; and of these opinions and feelings the traditions of the past, the needs of the present, and the hopes of the future all form a part." In the case of the Russian people, Mr. Ritchie argues that "the belief in the Czar's divine right is the source of his power, and the ground of his obedience." A similar point of view appears in M'Kechnie's *State and Individual.* "The effective force of a nation remains with the whole body of its members, whatever forms of expression or outlet it may find, and whatever agents may be legally empowered to act or think for it. The real or 'political' sovereign lies in the will of the people."

6. Dual or Divided Sovereignty. The peculiar situation of the United States in reference to the exercise of supreme and unlimited power has given rise to another attempt to alter this universal formula of a single sovereign body. In this country, as already said, neither the federal government nor the government of an individual state has unlimited power. The precise nature of the constitutional power of the two was long a subject of intense controversy. In this controversy there was developed the theory of a divided or dual sovereignty. According to this doctrine the totality of sovereign power was divided between the state and federal governments, each of which was sovereign in its own province, but was legally limited outside of its own province by the sovereignty of the other. Such a view of sovereignty is utterly inconsistent with the conception of sovereign power discussed above. The proper application of the analytical view of sovereignty to a federal government will be discussed in dealing with the general subject of federal organization.

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CHAPTER V

THE LIBERTY OF THE INDIVIDUAL

1. Formulation of the Idea of Civil Liberty; its Dependence on a Coercive Sovereign Power. — 2. Special Senses sometimes attached to the Term Liberty. — 3. Organic Theory of the State. — 4. Criticism. — 5. Elaborate Analogies of Spencer, Schäffle, etc.; the Personality of the State. — 6. Criticism.

1. Formulation of the Idea of Civil Liberty; its Dependence on a Coercive Sovereign Power. The formulation of the theory of the sovereignty of the state does not exhaust the consideration of the relations existing between the state and the individual. The present chapter is to be devoted to the further elucidation of the position of the individual under organized political control, and to the nature and scope of individual liberty. At first sight, the ideas of state sovereignty and individual liberty appear in sharp contrast. When we say that the state is legally supreme, that there is no limit to its lawful power, and that the individual can have no lawful rights as against its authority, we seem to have denied the existence of individual liberty. A closer examination of the meaning to be attached to the terms involved will serve to dissipate this view. It will appear that sovereignty and liberty, far from being contradictory, are correlative terms, and that no legal conception of individual liberty is possible without the assumption of a sovereign power.

Let us begin by observing that such terms as "liberty," "freedom," and "free" are used in a variety of senses, and with great latitude of connotation. "To Bacon and to King James," writes Professor Ritchie, "a 'free' monarchy meant an absolute monarchy, so that a 'free' monarchy is incompatible with what we call 'free' government. The 'liberties' of corporations, classes, or individuals mean their special privileges, and thus involve considerable interference with 'liberties' of the non-privileged. 'Freedom of contract' may result in the practical bondage of one of the parties to the other. A 'free' church may allow less 'liberty' of thought than churches which are not liberated from the state."[1] To the difficulties suggested by these special instances must be added the fact that the term liberty is used also as a vague generality to stand for something evidently desirable, and yet so simple in its nature as to need no further definition. It is freely assumed that every one ought to have complete liberty, and that every violation of liberty is an injustice, without the need being felt of any special inquiry into the meaning of liberty itself. To reduce the term to a definite and exact signification will serve at once to destroy the mythical and impossible idea of individual freedom, in the light of which the coercive power of the state seems unjustifiable. Such an idea appears in extreme form in the assumption, already referred to, of a "natural liberty," enjoyed by man independently of, and antecedent to, the existence of the state, and of which the institution of the state constitutes an abridgment. "What a man loses by the social contract," said

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[1] Ritchie, *Natural Rights*, chap. vii.

Rousseau, "is his natural liberty and an unlimited right to anything that tempts him which he can obtain."[1] Of a similar character is the confused ideal of liberty which lies at the basis of anarchism, or the negation of the right of coercion.

On examination it will appear that such a conception of liberty is impossible, except it be for one person omnipotent in power. The claim that a person in the enjoyment of natural liberty would have an unlimited right to anything he might desire, would carry with it the consequence that a great number of persons might have an unlimited right to the same thing. It is difficult to attach any meaning to the words "liberty" and "right" that will make such a proposition anything but absurd. Indeed, the statement is clearly self-contradictory and inconsistent. "Liberty in its absolute sense," says Lieber,[2] "means the faculty of willing and the power of doing what has been willed, without influence from any other source, or from without. . . . In this absolute meaning there is but one free being, because there is but one being whose will is absolutely independent of any influence but that which he wills himself, and whose power is adequate to his absolute will, — who is almighty." It is clear, then, that a liberty of this absolute and unrestrained character is an impossibility for every individual at the same time. It can exist neither by the agency nor by the absence of the state. The utmost freedom of action that each and every individual can enjoy upon like terms at the same time is to be completely unrestrained in his actions in so far as they do not interfere with the like freedom of his fellows. This conception of liberty, though limited, is entirely self-consistent. The liberty of one is not a contravention of the liberty of another. Such is the interpretation of liberty found in the famous Declaration of the Rights of Man, adopted in France in 1789: "Liberty consists in the power to do everything that does not injure another." Herbert Spencer expresses the same idea in what he calls the "formula of justice:" "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."

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[1] *Social Contract*, bk. i, chap. viii.

[2] Franz Lieber, *Civil Liberty* (1852). Lieber (1800–72), one of the most distinguished of American writers on political science, was for some time a professor at Columbia College. Of his other works, *Political Ethics* (1838) is perhaps the most important.

As thus conceived, liberty is not inconsistent with the exercise of coercive power. On the contrary, since the freedom from interference can only be enjoyed by the forcible prevention of interference, liberty is seen to be dependent upon the existence of authority. It is the state which guarantees this immunity to its citizens, whose "rights" are thus brought into legal existence by being clothed with the "sanction" or compelling force of the power of the state. The apparent paradox between a sovereign authority and a free citizen is thus explained. No freedom, except for a single being, can be absolute and complete. Such freedom as can be enjoyed by all must from its nature imply a compulsory restriction on the action of each. It is the office of the state to effect this restriction, and in so doing to bring liberty into being. It is usual to attach to this conception of individual freedom effected by the existence of a coercive state the term "civil liberty."

A further point of great importance is to be noted in connection with the present topic. It is true that liberty as thus defined is only possible for the individual by the action of the state. It does not follow, however, that it is the duty of the state to find the ideal of its action in the maintenance of individual liberty; that is to say, to confine its operating to enforcing non-interference, and to extend its coercive power no further than is necessary to prevent the citizens from interfering with one another. Writers of various schools, and especially the individualists of the earlier nineteenth century, have held this to be the sole duty of government. The conception of liberty seemed to them to imply that no infringement of the principle could be justified. But the question naturally arises whether the state may not be warranted in exercising a positive as well as a negative coercion over its subjects. May it not with reason interfere with and curtail the liberty of a citizen, provided that the general good or his own advantage is thereby furthered? The full treatment of this question will belong to our discussion of the proper province of government. All that need be noted in the mean time is that, whether the state is called upon to maintain the liberty of the individual, or whether it is held advisable that the state should interfere with his actions in a positive form, the existence of liberty is not logically incompatible with the existence of the state, and can hardly be thought of as existing apart from it.

2. Special Senses sometimes attached to the Term Liberty. The word liberty, in addition to the vague general use which we have discarded and the definite conception of civil liberty which we have adopted, has also been used in political writings in other special senses.[1] It is often used to designate a condition of national independence. When we refer to the present liberty of the Greeks, or the desire for liberty on the part of the Poles, it is evidently in this sense that the word is used. It is perhaps convenient to use the expression "national liberty" to indicate freedom of this kind.

In the next place, there is a use of "liberty" which refers neither to freedom from interference nor to national autonomy. When we say that the United States, France, and Great Britain enjoy the advantages of a free government, we mean thereby a government which is chosen by, and which is responsible to, the general body of the people. Liberty in this sense, or constitutional liberty, as it may be called, means popular government definitely established. Historically speaking, we often use the term constitutional liberty to refer to instances where not all the people, but only a minority of them, exercised the power of controlling the government. In England previous to the great reform and extension of the franchise in 1832, the power of government was vested in the hands of a small minority of the whole nation. Since, however, the body of the people followed in the main the political lead thus given, and looked to the minority in question (the voting class) to protect them from possible tyranny of the crown, we may speak of this state of things as constitutional liberty. Strictly, however, the term ought only to be used of a government in which the people rule. For if the name be applied to a system in which the government is responsible only to a minority of the nation, it implies an unwarrantable disregard of the political status of the majority.

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[1] An excellent analysis of the different political significations of the term is given in Professor Seeley's *Introduction to Political Science*, Lectures V, VI.

Professor Burgess,[1] followed by other American writers, sees fit to use the term civil liberty in a sense different from that explained above. Burgess claims that most European writers have unduly confused the idea of the state with that of the government; the state ought to mean that fundamental organization of the community by whose authority the government is created, and the power of the government limited. The government should mean only the ordinary mechanism of administration.[2] It is in this sense conceivable that the state may set a limit to the action of the government as against the individual, and grant to the latter certain privileges or immunities with which the government may not interfere. These immunities constitute the domain of civil liberty. In the United States, according to this view, the organization of the state is found in the body that makes and amends the Constitution. By the authority of this body it is forbidden to the ordinary government of the country (President, Congress, etc.) to interfere with the religion or the free speech of the individual; the government may not impose an export duty, may not make a law impairing the obligation of contracts, or confer a title of nobility.[1] The civil liberty of the individual is therefore defined by Burgess to mean all those rights thus granted to the individual by the constitution-making power. Were all governments of the same form as that of the United States this application of the term civil liberty would be felicitous and useful. But as applied to the governments of England, France, Italy, and many other countries a difficulty occurs. In England the Parliament (king, lords, and commons) is supreme. It is therefore (according to this interpretation) the state. It is also the government, ordinary and regular. It is hence not possible that it can forbid anything to itself by its own authority, or guarantee the individual the possession of rights which it cannot legally set aside. The conclusion is obvious. There is no civil liberty in the constitutional law in Great Britain. To assert this is properly equivalent to asserting that there can be no civil liberty at all under the British government. "I pass over the subject of civil liberty in the constitution of England and France for the simple and entirely convincing reason that there is none in either."[2] This being so, it may well be doubted whether the term is appropriately used in the significance thus attached to it. A definition according to which the citizens of Hayti enjoy a wide measure of civil liberty, while those of Great Britain and its colonies possess none at all, becomes a little absurd.

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[1] *Political Science and Constitutional Law*, vol. i.

[2] See above, chapter i. Professor Burgess's distinction between the government and the state is not here accepted as valid.

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[1] Constitution of the United States.

[2] Burgess, *Political Science and Constitutional Law*, vol. i, part ii, bk. ii, chap. iv. Burgess does not deny that there is civil liberty in Great Britain, but says that it is created by statute, not by the constitution. But his position seems inconsistent. For he says (vol. i, p. 174) that individual liberty "is a domain in which the *government* shall not penetrate." But in discussing civil liberty under the British and French systems, he asserts (vol. i, p. 262), "Every particle of civil liberty in both systems is at all times at the mercy of the government."

3. Organic Theory of the State. The question of liberty and sovereignty as hitherto discussed has been purely one of legal relations. It forms, however, only a part of the wider question of the general relation of the individual to the state, or to society at large. The view that is to be taken of the position in which the individual stands towards the state is of the highest importance, for on it will depend our decision as to the proper province of the action of government. In what has been said in the present chapter and in connection with the statement and criticism of the doctrine of the social contract, reference has been made to two conflicting points of view. In the one instance the individual is looked upon as a separate self-contained unit who joins with his fellows for the formation of civil society in a purely mechanical fashion. The state from this point of view becomes merely a numerical aggregate. It is not justified in interfering with the individual further than to prevent his interference with any one else. Such a theory of social relations is often spoken of as an arithmetical, mechanical, or monadistic theory of society.[1] We have already seen fit in dealing with the social contract to reject such a view of the relative status of the individual and the state.

As opposed to this we have at the other end of the scale what has already been referred to as the "organic theory of society," or of the state. This theory, either entire or in partial form, occupies a large place in the economic, political, and social philosophy of our time, and merits, therefore, a careful examination. Whatever be the earlier origins[1] to which it may be traced, it assumed a great prominence at the hands of various German writers of the middle of the nineteenth century, who advanced it in opposition to the more mechanical view of society held by the dominant individualist school in economics and political philosophy. The central idea of the theory is to endeavor to set aside the contrast between the individual and the state by amalgamating them into one. It discards all such ideas as mutual contract, reciprocal service, infrangible immunities, etc. It views the state and the individual as part and parcel of the same thing, both of them being included in what may be called the social organism. As is the relation of the hand to the body, or the leaf to the tree, so is the relation of man to society. He exists in it, and it in him. As it is impossible to consider that the hand has a separate existence from that of the body, so is it impossible to divorce the individual from society. The antithesis, therefore, between the single citizen and the collective state rests upon a false basis, and implies a view of society that is contrary to fact.

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[1] See J. S. Mackenzie, *Introduction to Social Philosophy*, chap. iii.

4. Criticism. In criticising this theory it is first necessary to know to what extent the statement that society is an organism is intended to be true. Some writers have advanced it merely as an analogy designed to elucidate by a striking comparison the nature of social organization. The continuity and gradual evolution of the state, the insensible gradations by which it develops in efficiency and complexity, are compared to the growth of a plant or animal. The different departments, councils, officials, etc., which are found in a modern administration, present in their specialized functions and adapted capabilities an analogy with the special organs of a living structure. The single individual, without whom the state cannot exist, and whose activities presuppose the existence of the state, suggests the germ cell which forms the basis of a living organism. Viewed in this light, the organic theory has met with a very wide acceptance, especially by the modern German school of writers on the social sciences. It is indeed difficult to quarrel with this or any other contention as long as it remains merely in the form of analogy. When we say that society is *like* an organism we are expressing an opinion of a very indefinite character. The point of the statement will depend on the amount of the likeness. In one sense every man is like every other; in another sense each man has a different appearance. To say, therefore, that there are certain things about society which suggest an organism, is to say what is hardly open to refutation. The real point of controversy comes in when we consider how far our opinions on social and political problems are to be affected by this view. Is it to be looked on merely as an interesting and ingenious comparison, or are we to see in it a profound truth in the light of which the actual solution of social difficulties is to be sought?[1]

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[1] The philosophy of the Greeks may be said to afford the first beginnings of the organic theory. "Man," says Aristotle, "is a political animal," and the whole tendency of Greek political thought was to insist on the subordination of the individual to the state. But the elaboration of the theory and its express application to the problem of governmental interference belongs to the nineteenth century. Such a view could only attain its full significance after the establishment of the evolutionary theory of the biological world.

It may perhaps be reasonably claimed that the importance attached to this view by many sociological writers is altogether exaggerated. It is hard to see in what way it offers a practical programme or line of direction in dealing with applied politics. The individualistic theory, dictating the abstinence of the state from all positive interference, had at least the merit of indicating a recognizable course of conduct. The utilitarian theory, propounding the greatest good of the greatest number as the goal of social effort, offers also an objective point theoretically distinct, however much its special applications might in practice be open to dispute. But the organic theory, in telling us that we and our institutions grow and are not made, hardly offers a practical guide to political conduct. It is impossible that we can sit politically passive and watch ourselves grow, and it is inconceivable that the theory ought to be interpreted to obstruct all deliberate volitional effort, and to substitute for it a self-contemplating passivity. To regard the organic theory of society as offering a definite solution of any social problem seems erroneous. The true purpose that it has served has been in helping to destroy the once prevalent conception that individual liberty must *à priori* be a good thing, and needs not to be considered on its merits.

5. Elaborate Analogies of Spencer, Schäffle,

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[1] The latter is the opinion expressed by Mr. M'Kechnie in his *State and Individual*, part i, chap. i. "This theory," he writes, "is not only correct, but contains the germ of the whole truth of Political Philosophy."

etc.; the Personality of the State. By some authorities the organic theory has been supported not as a useful analogy, but as a literal truth. To establish this fact they have analyzed in great detail the industrial and political structure of society, and shown that it conforms to the general organic type, and is therefore literally and actually an organism. Of such analysis, that offered by Herbert Spencer is the most familiar. Spencer,[1] it is true, does not entirely identify the social organism with the living organism. Society, he says, is an organism, but "it is not comparable to any particular type of individual organism, animal or vegetable." The analogy that he institutes, however, is carried into such detail as to stop little short of identification. The first point of resemblance is found in the fact that societies, like living bodies, begin as germs (small wandering hordes of people), and increase continually in mass and in complexity of structure. In both cases this increase in mass is effected either by simple multiplication of the units or by union of groups. Thus the organic integration of plants of the lowest order, which increase into a larger form by "clustering" into one, is compared to the amalgamation of primitive tribes. Multiplication and fusion of units may, in both animal and social growths, proceed simultaneously. The progressive complexity of structure is shown in the development of society, as in the development of plants and animals, by constant differentiation of special organs for the performance of special functions. In a rudimentary animal organism the same apparatus acts in an imperfect way as stomach and mouth, or as stomach and skin. Gradually each of these separate organs is evolved and restricted to its own function. An original spinal axis of an elementary character becomes separated into its vertebrated parts, the head differentiated from the backbone, and the brain from the skull. So in society, separate classes — kings, priests, medicine men — are differentiated from the original mass, and assigned to their peculiar activities. The division of labor in the society, as in the animal, makes it a living whole. The industrial division of occupation among weavers, iron-workers, food-growers, etc., corresponds to the independent functions of stomach, heart, and lungs. The original structures are found, on examination, to closely resemble the bodily structures. Spencer speaks of a manufacturing district as "secreting" certain goods; a seaport town "discharges and absorbs" them, performing a duty like that of the pores of the skin. Society has its "sustaining system," or parts devoted to alimentation. These are the great productive industries, — the agricultural areas, the "iron-secreting" districts, etc. There is also the distributing system, — the roads, railroads, and canals, which serve as the blood-vessels of the social body. The press, the telegraph, telephone, etc., serve as stimuli, by which the nerve centres are moved to action. Finally, there is in society, as in the living organism, the regulating system, — "nervo-motor" in the one, "governmental-military" in the other. These are evolved by the struggle for survival against the rapacity of other organisms. "The successive improvement of the organs of sense and motion have indirectly resulted from the antagonisms and competition of organisms with one another." The wars between societies originate governmental structures, and are causes of all such improvements in these structures as increase the efficiency of corporate action against environing societies. The special application of this last comparison lies in the argument advanced by Spencer that the govermental organ, like every other, should confine itself to the particular functions for which it has been evolved, — protection and defense, — and should abstain from wider action in the field of positive beneficence.

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[1] See *Principles of Sociology*, part ii.

As already said, Spencer does not completely identify the social organism with the living plant or animal. The chief difference is found in the fact that while the parts of an animal form a concrete whole, society is "discrete;" in other words, "while the living units composing the one are bound together in close contact, the living units composing the other are free and not in contact, and are more or less widely dispersed." Hence the political or social body is sensitive only in its units, whereas the animal organism has a "sensorium" in which its sentient existence is centred. Even this distinction Spencer is unwilling to unduly emphasize. The units of society, though not in physical contact, affect one another through the influence of language spoken or written; there is thus a psychological continuity where physical coherence is lacking.

A still more complete presentation of the social organism is offered by the late Albert Schäffle, the distinguished Austrian statesman and economist, in his "Structure and Life of the Social Body." Here the comparison of social with animal forms is carried to an extreme point, stopping little short of complete identification, though the author professes to be mindful of the differences existing between the two, and avoids the explicit use of the term organic. Schäffle speaks of the "morphology" and the "physiology" of society, the "social limbs of technique," etc. If the whole of his vast work is to be viewed as an analogy, it reaches the point where such elaborate comparison ceases to be either of interest or profit. Others of the modern Continental writers — for instance, Gumplowitz, the Polish publicist, in his "Sociological Idea of the State" (1892) — flatly and absolutely hold that the organic nature of the state is to be considered not as an illustration but as a literal fact. Of a still more extreme character is the contention of several of the German theorists that the state is a person. The claim that the state, or, if one will, the government, is a person in a purely legal sense of the term is what no one will deny. The government being an owner of property, a collector of taxes, a borrower of money, etc., can undoubtedly be clothed with an abstract personality. But the writers in question — Gierke, for example, in his "Fundamental Concepts of Public Law" — go beyond this. With them the personality of the state is not abstract but actual; out of the "social side" of each individual composing the state is compounded a new person, a totality of purpose which is the true constituent element of personality. Bluntschli even determines the sex, maintaining that the state is male and the church female.[1]

6. Criticism. This extreme theory of the personality of the state it is hardly necessary to criticise. It belongs to that class of abstractions which may mean much to the nation that originates them, but which seem to dissolve in passing through the prism of Anglo-Saxon literalism. The general organic theory merits, however, a special treatment.[1] Interesting as is the parallel between the collective aspect of humanity and the life of a single organic unit, the differences between the two appear on impartial examination so great that the analogy cannot be looked on as a true guide to social policy, or a true expression of man's relations to his environment. The difference that Spencer masks under the cognate terms "concrete" and "discrete," is in reality of a fundamental character. In neither the physical nor the metaphysical sense of the terms is it true that the individual *is* literally a part of society. The existence of each human being is a fact apart. The "existence" of society is only an abstraction. Society has no single brain, no "social sensorium;" it has no single physical life. This distinction is therefore more than a mere divergence of special qualities. It is essential and absolute, — it is the difference between "black" and "white," and between "yes" and "no." Even if we accept the analogy as only an analogy, it does not follow that it is always a proper guide for our social conduct. Too great an amalgamation of the individual and the state is as dangerous an ideal as a too great emancipation of the individual will. Individual variation, individual "unlikeness," and, in a sense, individual isolation of effort is as necessary for the welfare of mankind as collective activity and mutual support. The organic theory of society, deprived of its ingenious biological setting, presents only one phase of the truth, erring in one direction as much as extreme individualism has erred in the other.

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[1] On the subject of the personality of the state consult also Jellinek, *Allgemeine Staatslehre* (1900).

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[1] For criticism of the organic theory see J. S. Mackenzie, *Introduction to Social Philosophy*, chap. iii, and W. W. Willoughby, *The Nature of the State*, chap. iii.

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CHAPTER VI

RELATION OF STATES TO ONE ANOTHER

1. External Aspect of the State; Regulation of its Conduct towards other States. 2. Evolution of International Relations: First, Second, and Third Periods. 3. Scope and Content of International Law. 4. Propriety of the Term. 5. International Arbitration.

1. External Aspect of the State; Regulation of its Conduct towards Other States. Viewed in a purely theoretical light, every state is an absolutely independent unit. Its sovereignty is unlimited, and it renders political obedience to no outside authority; it has no organized coercive relation with any other political body. Such theoretical isolation is the prime condition of its existence as a state, and its political independence is one of its essential attributes. This is what Hobbes meant in saying that, in regard to one another, separate states are to be viewed as in a "state of nature." Yet while this is true in a purely formal and legal sense, it is nevertheless the case that in actual fact different states stand in close contact with one another in a variety of ways. The mutual intercourse and communication of their citizens, trade, commerce, and various common interests, bring separate states into permanent relations demanding some sort of regulation. The fact that in the civilized world the citizens of one country very largely share in the thought, the art, and the literature of neighboring communities, runs counter to the idea of political exclusiveness. The political as well as the social and cultural institutions of any modern state are largely affected by its contact with other states. Especially is this the case where the citizens of countries politically separate speak a common language, and where a kindred descent enables them to look back to the same history and traditions in the past.

It is, therefore, easily understood that in the evolution of their dealings with one another in relation to diplomacy and civic intercourse the action of modern states shows an increasing tendency to conform to a generally recognized usage. Even the conduct of war is adapting itself to a code of regulations, designed to mitigate as far as may be the suffering it involves, and to reduce to a minimum the injury it occasions to the commerce of the world. These rules and usages which regulate the peaceful intercourse of independent nations, and indicate a recognized method of warfare adopted by general consent, are not to be regarded as fixed and permanent. They are rather in a formative and imperfect stage of development. But the study of modern political institutions is not complete without an analysis of the nature of the bond thus created between different states, the extent of its obligation, and its especial significance for the future. Political science must take account not only of the internal organization of the state, but of its external relations in so far as they assume a regular and definite character.

Imperfect as they are, the "rules which determine the conduct of the general body of civilized states in their dealings with one another are termed International Law."[1] The question at once arises whether the existence of such regulations can be harmonized with the sovereignty of the individual state. As we have understood it, the term "law" is properly to be restricted to the command, express or tacit, of a supreme legal authority; we have seen that it is probably inexpedient to use it in reference to customary observances not deliberately controllable by a political superior. In other words law has been restricted to mean the command of the state, the two terms being correlative to one another. Such being the case, it is now to be asked whether the term international law is properly applied, and whether the sanction or compelling force behind its rules and regulations is sufficient to entitle it to be considered as really law. To undertake this inquiry it will be necessary first to pass very briefly in review the evolution of international relations, and the interpretation put upon them in political theory, and in the second place to indicate the scope and extent of the rules of international law as now existing. By doing this, its true character, both as it is and as it may become, will be set in a clearer light.

2. Evolution of International Relations: First, Second, and Third Periods. The evolution of international relations may be divided into three great stages. The first embraces the period from the origins of European civilization till the fall of the Roman Empire, the second extends from that date until the peace of Westphalia (1648), and the third period from the peace of Westphalia until the present day.[1] During the first period we find no recognition of international obligations as such. The claims and duties associated with kinship were recognized as a bond between communities of a common descent and tongue. But between tribes and nations alien to one another there was no recognized system of peaceful intercourse or acknowledged principles of legitimate warfare. The tribes of the Israelites observed in the dealings with one another the bond of common birth; they viewed themselves as forming a political system, each member of which had certain indefinite obligations towards the others, while all of them were disconnected from the outer world of Gentiles. In the same way the city states of ancient Greece, though jealously guarding their political autonomy, felt themselves bound by the ties of race to their fellow Greeks, a relation which found its expression in the Amphiktyonic Council, the federations of cities, and the observance of a rudimentary code of warfare. But towards the outside world — the barbarians, as the Greeks call them — no such obligations existed. In so far as the Greeks recognized a system of interstate relations, it was applicable only to the Hellenic people. The Romans, also, previous to their imperial aspirations of universal dominion, occupied the same theoretically isolated position. Rome, it is true, during the republican period of her history, entered into treaties with the Samnites and other Italian tribes. They had also certain systematic observances which bear some resemblance to a code of international conduct. But the

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[1] This is the definition given by Professor T. J. Lawrence (*International Law*, chap. i). In attempting to define international law one meets at once the difficulty as to the extent of its sanction.

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[1] Division given by Lawrence, *International Law.* See also Walker, *History of the Law of Nations*, Halleck, *International Law*, chap. i.

Jus Feciale was merely a system of ceremonial acts which constituted the formalities thought necessary for a declaration of war, the conclusion of a treaty, etc. The *Jus Gentium* offers in its name a confusing analogy with international law. Its precise nature is a matter of some controversy, but it is safe to say that it was a code of regulations which applied not to the dealings of one nation with another, but to the dealings of citizens belonging to different nations. It took its name most probably from the fact that its rules were presumed to consist of principles of conduct common to the laws of all nations.[1] But in none of these cases do we get a standing theory of international relations. Conduct towards outside nations might of course be influenced by motives of religion, of friendship, or of expediency, but we find nothing approaching to a systematized view of the relative position occupied by political societies, each possessing towards the rest a definite status with standing rights and standing duties.

In viewing the second period, that following the establishment of the world empire of Rome, we find the outlook entirely changed. The Romans had made themselves masters of the known world and from the pride of their exalted position originated a new theory of political relations. The universal sovereignty of a single power became the dominant idea, the theoretical ground plan of political institutions. The idea of a common superior holding the supremacy over all the political subdivisions of the world appealed at once by its grandeur and its logical consistency. It endured in theory long after it had vanished in fact.[1] Even as a fact, universal sovereignty, in territorial extent, if not in intensity, seemed at the time of Trajan (A. D. 98–117) to reach its realization. The "appeal to Cæsar" represented everywhere the recourse to a final authority. The actuality thus lent to the conception was strengthened by the universality of the Christian religion, which became after the conversion of Constantine (A. D. 312) the state religion of the imperial system. Even after the decline of the imperial power under the disruptive force of the barbarian invasions, the idea of universal dominion as a necessary basis of political life still survived. The restoration of the Roman Empire by Charlemagne (A. D. 800) served to give expression to this ideal. But in the succeeding centuries the conception of the nature of the political constitution of the universe underwent a vital change. The church presented itself not as a complementary, but as a rival power. It became necessary in theory to divide universal dominion between the secular and the spiritual sovereigns, whose conflicting pretensions helped to break down the conception of a single final authority.[2] The feudal tenure of land gradually brought into prominence the notion of territorial sovereignty (political power operative not as over a people but over a certain definite territory), on the basis of which arose the modern theory of territorially independent states. Finally the religious schism of the Reformation destroyed the idea of the spiritual unity of mankind. The peace of Westphalia (A. D. 1648), which closed the thirty years' war in central Europe between the forces of Catholicism and Protestantism, may be taken as indicating the close of the era and the final disappearance of the theory of universal sovereignty.

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[1] For the *jus gentium*, see Sir Henry Maine's *International Law;* Halleck, *International Law*, chap. i. Walker cites various instances of the term *jus gentium* used in reference to international obligations and approximating in its meaning to public international law.

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[1] Dante, in his *De Monarchia*, arguing on the imperial side of the great controversy of the middle ages, undertakes to show the need of a single emperor, or sovereign, with power over all others.

[2] For the great mediæval controversy between the empire and the papacy see Bryce, *Holy Roman Empire*, and Dunning, *Political Theories Ancient and Mediæval.*

During the third period — from 1648 until the present day — the theory of international relations has been reconstructed on a new basis of political independence and territorial sovereignty. Modern international law is essentially the product of this period. At the opening of this era the destruction of the earlier system and the ideas which accompanied it seemed to have removed the basis of international dealings and to reduce the monarchies of Europe to the anarchy of the state of nature. The savagery of the European wars of the sixteenth and seventeenth centuries threw into a strong light the need for a reconstruction of the theory of the interrelation of political communities, now that the idea of a single common superior, either temporal or spiritual, was no longer tenable. It was this situation which called forth the writings of the great Dutch jurist Hugo Grotius, in which were laid the foundations of modern international law. Grotius and his followers [1] found the basis for their doctrine of international obligations in the reconstruction of the idea of a law of nature long ago assumed by the Stoic philosophers in reference to the relations of individual men. According to this doctrine there was supposed to exist in the very nature of things a code of moral obligations of man to man, which did not depend for its validity upon human enactment. It existed antecedent to any system of government and law and could be discovered by the natural light of reason. "The principles of natural law," says Grotius, "if you attend to them rightly, are in themselves patent and evident almost in the same way as things which are perceived by the external senses." Such a theory of natural law is essentially fallacious, and, as has been already seen, it disintegrates upon a closer analysis.[1] Nevertheless it served a useful purpose in offering a possible starting-point for constructing a system of mutual rights and duties existing between states without a common superior. This theoretical assumption of a determinable and universally binding law of nature, though it affords, historically speaking, the starting-point of international law, is by no means its only source and basis as it now exists. The major part of it rests upon the successive treaties and conventions by which the great states of the world have adopted certain more or less defined principles to regulate their intercourse with one another in peace and war. At the beginning of the era stands the treaty of Westphalia, to which all the Continental sovereigns of Europe (except the Pope and the Sultan) were parties, and in which "the representatives of civilized Europe united to formally proclaim the erection upon the ruins of world-sovereignty of an international system of states, unequal indeed in power, but claiming each to be independent and each to exercise an exclusive jurisdiction within definite territorial limits."[1] Of the later treaties some are mainly concerned with the allotment of territory. Of this character is the treaty of Utrecht (1713), which closed the long war against Louis XIV, and the treaty of Paris (1763) at the end of the Seven Years' War. In others a fundamental point is the recognition of sovereignty, as in the treaty of Versailles (1783), recognizing the independence of the United States, and in the treaty of Paris (1856), in which the independence and integrity of the Ottoman Empire is guaranteed[2] and whereby it is admitted "into the public law and system of Europe." In other treaties principles of conduct are adopted for future guidance. Thus at the Peace of Utrecht four of the signatory powers accepted the principle that real property confiscated from the subjects of an enemy should be returned at the close of the war. The treaty of 1841[3] in regard to the navigation of the Dardanelles and the Bosphorus asserts the territorial jurisdiction of a state over adjacent waters. The international law in respect to neutral commerce and maritime capture has been the subject of a long series of treaty clauses. The principle that "free ships make free goods,"[4] adopted (from older precedents) by the United States in the French treaties of 1778 and 1800, gradually gained a general assent and was recognized in 1856 in the Declaration of Paris, which accompanied the treaty already mentioned. An equally important instance of principles of international conduct consolidated by treaty is seen in the treaty of Washington (1871), between the United States and Great Britain; here the duty of neutral powers to use a proper diligence in preventing their territory from being used as a basis of operation and equipment by a belligerent is accepted as a binding rule.[1]

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[1] The chief work of Grotius is his *De jure Belli ac Pacis* (1625). Puffendorf (a German, for some time secretary of state at Stockholm) published his *De jure Naturae et Gentium* in 1672; Bynkerschoek's *Quaestiones Juris Publici* appeared in 1737.

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[1] In reference to the history and criticism of the theory of a law of nature Professor Ritchie's *Natural Rights* may be consulted.

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[1] Walker, *op*, *cit.*, part i, chap. ii.

[2] By great Britain, Austria, France, Prussia, Russia, and Sardinia.

[3] Signed by Austria, France, Great Britain, Prussia, Russia, and Turkey. See Alison, *History of Europe from the Fall of Napoleon*, vol. vi, ch. xxxiv.

[4] See Lawrence, *op. cit.*

In addition to deliberate assent to treaty provisions nations may express their adherence to rules of international conduct in various other ways. Public documents issued by a state in the form of proclamations or manifestoes to its subjects on the outbreak of a war, enjoining their observance of certain regulations in reference to belligerents and neutrals are of this class. A further source of international law may be found in the decisions of prize courts, or special tribunals whose business it is to adjudicate on the legality of captures made at sea in time of war. Lastly may be cited the opinions expressed by the great jurists who have written on the subject. It goes without saying that the mere opinion of any individual writer has of itself no binding force. But since all written laws and regulations must be submitted to the process of interpretation, the opinion of an eminent specialist as to the proper interpretation of a recognized formula is evidently of force, and it has always been customary to cite as testimony the opinions of international jurists. Kent in his "Commentaries"[1] states the point thus: "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."

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[1] Text of treaty, art 6. See *Annual Register*, 1871.

3. Scope and Contents of International Law. Let us now consider very briefly the range of the subject-matter of the international code that has grown up on this basis. It presumes as its starting-point a number of separate, independent states, all of which are absolutely equal in rights. "No principle of law is more universally acknowledged," said Chief-Justice Marshall, "than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone." Next to the establishment of this cardinal proposition comes the discussion of the territorial limits of jurisdiction, the relation of the sovereign power of a state to the adjacent waters of its coast. With this is connected the question of the legitimate means of increasing territorial jurisdiction, and the validity of claims arising from conquest, cession, original settlement, and so forth. Rules are also laid down in regard to the jurisdiction and responsibility of a state in reference to its subjects while resident abroad. These with other questions of like character constitute the subject-matter of international law

[1] *Commentaries*, vol. i, p. 19.

as applied to nations at peace with one another, — the "law of peace," as it is called. The larger part of the code, however, is occupied with the rules of war. Unfortunately international law is as yet unable to offer any binding system according to which disputes may be settled in a peaceful manner. It is therefore compelled to assume that controversies will in the last resort be settled by force of arms. The best that it can do in this case is to prescribe certain regulations whereby the conduct of war may be as humane as possible and may occasion the least possible injury to the property and commerce of non-combatant powers. For this purpose international law defines the legitimate agents and methods of war; it prohibits, for example, the use of bullets which occasion needless suffering, the recourse to assassination, poisoning, etc. It indicates for the use of belligerents a system of communication with one another by flags of truce, passports, and safe conducts. What is still more important, international law contains an elaborate set of regulations in regard to the rights and obligations of neutral states in time of war; as far as possible it permits the trade of neutral ships to and from the ports of belligerent powers to continue undisturbed. Only when the trade in question is with ports actually blockaded, or consists in a commerce of articles useful for purposes of war, does it become legitimate for a belligerent power to interfere with it. It is in particular the law of neutrality that has been extensively developed in the eighteenth and nineteenth centuries, and it now constitutes the most important part of international law.

4. Propriety of the Term. Taken altogether, this systematized regulation of international dealings, both in peace and war, presents an imposing appearance, and the code of rules which are thus adopted bears a strong analogy to the internal or municipal regulation of any particular state. But it will be clear, from what has gone before, that there is a difference between the two of an important character. The observance of the municipal law is compulsory upon the individual citizen. If he attempts to violate it he is restrained, or at any rate punished after the fact by the physical force controlled by his government. But there is no such definite obligation upon the individual state to comply with the principles of international law. A state which undertakes to violate them may or may not meet with punishment; the state upon whose rights (under international law) another infringes may or may not resort to arms; and even in the event of armed conflict the injured power may meet with defeat. Nor is there any single power, or group of powers, whose business it is to enforce these principles of international conduct. International law is devoid of an authoritative and explicit "sanction."

It is on this ground that are based the criticisms of the applicability of the term "international law," and of the status and character of its rules, that have frequently been advanced. "I think, my Lords," Lord Salisbury once said to the House of Lords, "we are misled in this matter by the facility with which we use the phrase international law. International law has not any existence in the sense in which the term law is usually understood. It depends generally upon the prejudices of the writers of the text-books. It can be enforced by no tribunal, and, therefore, to apply to it the phrase *Law* is to some extent misleading." The same objection is urged in detail by Austin (the leader of the English analytical school of jurists) in his "Lectures on Jurisprudence." Since, according to Austin, the essence of a law lies in its enforcement, the name "international law" is improper; the rules in question belong to the general domain of what Austin calls "positive morality," or rules imposed by current opinion (as also are the "laws" of fashion and the "laws" of honor), but not coercively enforced.[1] The regulations affecting the conduct of political states towards each other could only be termed "law" in the Austinian sense if there were in existence some superior power competent and willing to guarantee their enforcement. Such a power might be imagined as existing in the shape of a general federation or league of states pledged to the recognition of the international code and united to prohibit any breach of it. An arrangement of this sort, as soon as it became really valid and permanent, would in reality bring the associated nations into a single state. It might, therefore, be doubted whether even in this event the term "international law" would not still be a misnomer; for "nation" in this sense being a political and not an ethnological term, the union of the "nations" under a single law would constitute them a single state.

As against the point of view adopted in such criticisms of the propriety of the term "international law," various arguments may be adduced.[2] In the first place, the objection urged by many writers[1] adopting a restricted connotation of the term "law" may also be applied here. We have seen that law in its strict sense is not applicable to a state of society in which life is regulated to a large extent by custom, and to which the idea of deliberate enactment is altogether alien. Nor is the term in its strict sense applicable to a community in which imperfect political organization or chronic anarchy renders the general obedience to regulative control spasmodic and uncertain. Many writers have therefore preferred to expand the sense of the term "law" in order to make its use extend to societies of this character, and recognize the existence of "law in the making," as well as of law. Viewed in this light, international law may be considered as truly law, although as yet only in an inchoative stage; it becomes analogous, as Sir Frederick Pollock expresses it, "to those customs and observances in an imperfectly organized society, which have not yet fully acquired the character of law but are on the way to become law."

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[1] Austin, *Jurisprudence*, Lecture V.

[2] See Jellinek, *Recht des Modernen Staates*, pp. 302–307, 337–341.

Even at the present stage of its development international law is not so much devoid of a binding sanction as might at first appear. Where its precepts are definite and their meaning obvious, the general presumption of civilized opinion — a potent factor in the world politics of our day — is against any power acting in violation of them. A flagrant disregard of international law would involve a decided loss of national prestige, and offer a perhaps tempting chance for intervention on the part of an outside power. The weak part of the system lies in the fact that, in the absence of authoritative interpretation, it is possible for any power to put its own construction on the rules of international law, and to profess to assent to their validity while, in the eyes of others, violating their provisions. To render complete a system of international regulation, there would be needed not only a physically coercive power to prevent armed conflict between state and state, but also a method for the proper adjustment of controversy. As our municipal law necessitates a set of courts for the settlement of private disputes, an international court, or group of courts, would be needed to replace the recourse to arms hitherto the final method of settling international quarrels. In other words, the realization of international law demands the establishment of compulsory international arbitration.

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[1] See Chapter IV, above.

5. International Arbitration. Arbitration, or the settlement of differences between independent states in accordance with the adjudication of a third party, has, even in the form of a voluntary recourse to such a decision, only assumed any considerable proportions in the last half-century; of a compulsory system of arbitration we have as yet only the merest beginnings. It is of course true that there have always been examples of disputes settled by the mediation of a third party. During the mediæval and early modern period, while the theory of a common superior still persisted, recourse was often had to the Pope as an arbiter between contending princes. But such arbitration, except in the case of the celebrated award by Pope Alexander VI, dividing the New World between Spain and Portugal, and in a few lesser instances, was not applied to questions of great magnitude. In the seventeenth and eighteenth centuries international arbitration is scarcely found, but the circumstances of the nineteenth have especially favored the development of the principle. The increasing costliness of war, the dislocation that it occasions not only to the industrial life of the belligerents, but to that of all countries associated with them, the growing interdependence of general financial and commercial operations throughout the civilized world, put a strong premium on any method of settling quarrels without actual war. It is true, as most writers on the subject point out, that as yet arbitration has not been applied to subjects of really vital importance. But there have already been instances of its use in cases in which, though neither national existence nor honor was at stake, pecuniary and territorial claims of great magnitude were involved. As between the United States and Great Britain arbitration has repeatedly been employed, especially for the rectification of boundary lines, as in 1827 in regard to the northeast boundary,[1] and in 1846 for the boundaries on the Pacific coast. Still more celebrated is the successful arbitration of the question of the American claim for damages on account of the devastations of the Alabama and other Southern cruisers, a matter which, by the treaty of Washington (1871), was referred to a special tribunal, and ended in the award of a compensation of $15,500,000 to the United States. Arbitration was also successfully employed in 1889 by the United States, Great Britain, and Germany in reference to Samoa. There have been in the nineteenth century over a hundred important cases of arbitration effected by special tribunals or specially appointed umpires.

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[1] The award made in this case by the king of the Netherlands was rejected by the United States.

A further stage of development is found in the attempt to constitute a permanent tribunal for the settling of international disputes and in the conclusion of treaties to effect a standing method of recourse to such a tribunal. After various proposals from important quarters in the closing years of the nineteenth century, a successful plan was put into operation by a convention signed at the Hague by the Great Powers in connection with the Peace Conference of 1899. Under this agreement a permanent court of arbitration is established. It consists of a panel of distinguished jurists, of whom four are nominated by each signatory power, and from the total number of whom international disputants may select two each to act as arbitrators, the persons chosen themselves adding an umpire. The procedure to be adopted by the tribunal thus created is also prescribed. Although recourse to the tribunal at the Hague is not obligatory upon the signatory powers, it nevertheless offers standing facilities for peaceful settlement very difficult to bring into being during the strained relations occasioned by acute international controversy. The work thus accomplished has been further supplemented by special treaties among the powers which thereby pledge themselves to adopt a settlement by arbitration where possible. In nearly all cases the agreement to submit to arbitration matters of controversy that may arise between two states is made with certain reservations. Questions which involve the independence, national honor, or "vital interests" of a state are excluded from the operation of arbitration.[1] Within the limits thus assigned treaties of five years' duration for reference of disputes to the Hague tribunal have been made, in identical terms, by Great Britain with France, Italy, Spain, and Germany, and by France also with Italy and Spain. These treaties provide that "differences of a judicial order or relative to the interpretation of existing treaties between the two contracting parties which may arise, and which it may not have been possible to settle by diplomacy, shall be submitted to the permanent court established by the convention of July 29, 1899, at the Hague." Various treaties of like character are under negotiation. In 1897 a treaty was made at Washington, between the United States and Great Britain, but was not ratified by the Senate. It proposed to submit pecuniary claims and territorial questions to a mixed tribunal representing both countries. For territorial controversies the court was to be composed of three members of the United States Supreme Court and three from the British Supreme Court of Judicature, and to act only by a majority of five to one. A peculiar importance attaches to the recent treaty between Holland and Denmark. Here all subjects of controversy, without any reservation, are referred to the Hague tribunal.

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[1] It is a condition of the Anglo-French treaty of 1904, and of those identical with it, that "neither the vital interests nor the independence nor honor of the two contracting states, nor the interests of any state other than the two contracting states shall be involved." Such a proviso, unavoidable though it is in practice, seriously impairs the theoretical completeness of the arrangement, since each state must remain the judge of its own vital interests, and may therefore at any time refuse to admit the applicability of arbitration.

In the light of these recent developments the present position of international law and international arbitration may be considered as highly encouraging. There is undoubtedly in all civilized countries a large and a growing force of public opinion against war which makes strongly in favor of a more and more definite establishment of an international code with properly constituted tribunals to pronounce upon its observance. In many quarters, it is true, there is a lingering feeling that war must remain as the "natural" and honorable settlement of controversy. Baronial war and the private duel died hard, and undoubtedly national war will die harder still. Sir Robert Finlay, attorney-general of Great Britain (1904), has recently written that "there are some questions which no country will consent to leave to the judgment of any court or arbitration; every nation must be the guardian of its own honor." It is not easy to see why the same reasoning would not leave the individual citizen as the guardian of his own honor and insist on the retention of the duel as the proper method of settling private quarrels. The development of international solidarity is slow, but it may fairly be supposed that it will be continuous. From the courtesies of international custom we may pass to the indefinitely binding code and thence into something approximating to an international government and international state. Undoubtedly the experience of the world in the creation of such huge political units as the United States, Canada, Germany, and Australia by the process of federation may aid in creating a still more imposing structure in the "Parliament of man and federation of the World."

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CHAPTER VII

THE FORM OF THE STATE

1. The Classification of States according to their Form; Aristotle's Divisions. — 2. Later Classifications; Montesquieu, Rousseau, Bluntschli, etc. — 3. Practical Classification of Existing States. — 4. The Constitution; Written and Unwritten Constitutions. — 5. Origin of Written Constitutions. — 6. The Distinction between States with Written and those with Unwritten Constitutions an Illusory Basis of Division. — 7. Scope of the Constitution. — 8. Amendment.

1. The Classification of States according to their Form; Aristotle's Divisions. Although all states must possess the essential requisites of territory, population, unity, and sovereign organization, they nevertheless differ widely in respect to the extent of their territory, the number of their population, and the peculiar nature of their organization. It is natural, therefore, to attempt to group them under some system of orderly classification; indeed, from the time of Aristotle onwards, almost all writers on Political Science have indicated some such classification. To subdivide states according to the extent of their territory, for instance, into classes each containing so many thousand square miles, would obviously be of very little significance; to divide them according to population would be equally easy and valueless. The evident basis of classification is that of the organization of the state; in other words, states are divided according to the structure of their governments. Some writers have held that we ought not to speak of a classification of states, since all are identical in their essential attributes. They prefer to classify instead the different "forms of government" seen in the state. The objection does not seem well taken. The differences in structure of government constitute the basis of classification, but we may on that basis either speak of the various "forms of government" or "forms of the state." [1]

The starting-point for all later discussion is found in the celebrated classification given by Aristotle in his "Politics." He divides the forms of government according to the number of persons in whom the controlling power is vested. Where the power is vested in a single person the government is a monarchy. Power vested in the hands of a few constitutes an aristocracy. Where the general body of the citizens rule, we have a polity. Thus far the classification had already been indicated by Herodotus, but Aristotle proceeds further in distinguishing between what he calls the "normal" and the "perverted" forms of the state. The normal states are those which aim at the good of the community as a whole; the perverted forms are those which exist for the benefit of the ruler or the ruling class. The terms mentioned above are reserved for the first class; thus a monarchy is a government by a king for the good of the whole community, while an aristocracy or a polity is a government by the enlightened few or by the citizens at large for the same end. Of the perverted forms a tyranny means the government by a tyrant for his own ends, an oligarchy the government of the minority in their own interest, while a democracy signifies the selfish government of the "mob." It is to be observed that in translating Aristotle's terminology literally, the word democracy is shifted out of its modern meaning and becomes a term of opprobrium; some writers have therefore preferred to avoid a literal translation and to use "democracy" for the normal or beneficent form, and to substitute "ochlocracy" to mean mob-rule.

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[1] "It need not be said that there can be no such thing as a classification of states. In essence they are all alike, — each and all being distinguished by the same sovereign attributes." W. W. Willoughby, *The Nature of the State*, chap. xiii.

The classification thus offered was intended by Aristotle to bear a peculiar significance in that it typified not only the divisions of governments, but also indicated a series of forms, representing what might be considered the natural evolution of government. An original kingship was presumed to change into an aristocracy and then through successive stages of oligarchy and tyranny into democracy. "The first governments," says Aristotle,[1] "were kingships, probably for this reason, because of old when cities were small, men of eminent virtue were few. They were made kings because they were benefactors, and benefits can only be bestowed by good men. But when many persons equal in merit arose, no longer enduring the preëminence of one, they desired to have a commonwealth and set up a constitution. The ruling class soon deteriorated and enriched themselves out of the public treasury; riches became the path to honour, and so oligarchies naturally grew up. These passed into tyrannies, and tyrannies into democracies: for love of gain in the ruling classes was always tending to diminish their number, and so to strengthen the masses, who in the end set upon their masters and established democracies."

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[1] Aristotle, *Politics*, ii, chap. xv.

Some writers in their analysis of the Aristotelian classification have put forward as the "natural" order of succession, — monarchy, tyranny, aristocracy, oligarchy, polity, and lastly democracy. The last in its turn may again change into monarchy and hence form a recurring cycle.[1] The process may be explained in detail thus: —

Starting for instance at a given point in the cycle, we find a government in existence as a hereditary monarchy. With the degeneration of the character and aims of the successive monarchs, it passes into a tyranny, and is no longer directed towards the public good. The united efforts of the more powerful magnates of the community overthrow the monarch and set up an aristocratic government. This again degenerates, loses the public spirit which at first inspired it, and lapses into an oligarchy. Against this régime the citizens as a whole break into successful revolt and establish a "polity," or in modern terminology a democracy. Pushed to an extreme the democracy is converted into the oppression of the rich by the masses, and thus becomes an ochlocracy (Aristotle's democracy). The intolerable confusion that results is brought to an end by the emergence of an all-powerful warrior-statesman who establishes himself as a king. Thus the cycle has run its course and begins again.

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[1] This is the interpretation given to Aristotle's theory by Woodrow Wilson (*The State*, chap. xiii, §§ 1395-1397). It is interesting in this connection to consider Plato's discussion of the same subject, and Aristotle's criticism of Plato's view. See Plato, *Republic*, viii, § 545; and Aristotle, *Politics*, v, chap. xii.

The theory of political change laid down by Aristotle appears, to a large degree, corroborated by the history of the Greek city states in the centuries preceding the Peloponnesian War;[1] indeed it was as an interpretation of their recurrent experience that Aristotle, who was essentially an inductive and practical writer, offered this view of political permutations. Even in recent history examples are found of a more or less complete political progression of this sort. The French despotic monarchy of the eighteenth century was overthrown by the revolutionary movement (1789–92), which in its inception was largely under the guidance of the enlightened minority, and whose initial stages might therefore be looked upon as the overthrow of despotism by aristocracy.[2] In the second phase of the revolution the aristocracy, as represented by the property-holding voters of the constitution of 1791 (an oligarchy, in the minds of the Jacobin extremists), were overthrown, and the republic established, resting theoretically on universal suffrage and complete democracy. The turbulent anarchy into which this democratic régime degenerated (1793–99) was brought to an end by the emergence of a military monarch in the person of Napoleon Bonaparte. The links of the progression are not precisely complete, but yet offer an analogy in some degree corresponding to the Aristotelian cycle. The last-mentioned phase, the suppression of anarchic disorder by the establishment of a military autocracy, is one that has shown itself specially liable to recur. Yet when all is said, it cannot be argued that the Aristotelian cycle is to be looked upon as a necessary or even as a normal course of political change. Even Aristotle, who regarded it as normal, shows by his discussion[1] of the means of preventing revolutions that he did not consider it as inevitable. Least of all does it hold true of the condition of the modern political state. Nor is the classification of states into monarchies, aristocracies, and democracies to be looked upon as a satisfactory and sufficient division as applied to the modern world. In the first place, the terms monarchy and democracy open the way at once to great confusion. If a democracy means, as Aristotle's polity does, a system in which the political power lies in the mass of the people, Great Britain is to be classed as such, and falls into the same category as the United States, notwithstanding the obvious formal difference between these two governments. If, on the other hand, having regard to the existence of a titular sovereign, Great Britain is classed as a monarchy, it falls into the same class of government as Russia or Persia, an absurdity equally glaring. It is thus seen that the Aristotelian division offers no adequate treatment of constitutional or limited monarchies, which are nevertheless as prominent as any existing form of government. The classification is inadequate, too, in other ways. It fails to take account of the difference between a federal and a non-federal or unitary government, — a distinction which, as we shall presently see, is of the greatest importance in connection with modern states. Nor does it make any distinction between governments according to the differences of the constitutional relation of legislature and executive. This also, as we shall see, is of the greatest importance.

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[1] An able analysis of the origin, development, and decay of the Greek city state is given by Ward Fowler, *The City-State.*

[2] The fact that the constitution of 1791 conferred the suffrage only on the property-holders lends color to this view. See Aulard, *Histoire Politique de la Révolution Française.*

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[1] *Politics*, bk. v.

2. Later Classifications; Montesquieu, Rousseau, Bluntschli, etc. Imperfect, however, as the Aristotelian formula is, it was nevertheless accepted as one of the cardinal tenets of political science. Not until quite modern times do we find it subject to serious modification or expansion. Montesquieu, whose "Esprit des Lois" (1748) will fall under consideration in the succeeding chapter, proposed a division into republican, monarchial, and despotic governments. Republican government was that "in which the people as a body or even a part of the people has the sovereign power; monarchial, that in which a single person governs, *but only by fixed and established laws;* whereas in despotic government a single person without any law or rule, conducts everything according to his will and caprice."[1] Rousseau offers a division of governments into monarchies, aristocracies, and democracies, subdividing aristocracies into natural, elective, and hereditary. He admits also the existence of mixed forms of government, as in the anarchical kingdom of Poland. Many other writers of the eighteenth and earlier nineteenth centuries offer variations of the classification of Aristotle, all of which, however, are open to the same objection of inadequacy as applied to the complex organization of modern states. Bluntschli presents a unique addition to the list of governments in the shape of theocracy, a normal form to which there corresponds a perverted form, "idolocracy." The former name is applied to states "in which no human authority has been recognized, in which the supreme power has been attributed either to God, or to a God or to some other superhuman being, or to an Idea. The men who exercise rule are not regarded as its possessors, but as the servants and vice-gerents of an unseen ruler. Its perversion may be called Idolocracy." Such a classification seems quite fallacious. For even granting the validity of this fourth class, it lies crosswise of the other three, and is not exclusive of them. We might have a theocracy that had the form of a monarchy, an aristocracy, or a democracy. Other writers have attempted more elaborate methods of division, which are intended to account for all the various historical forms of the state. Of this nature is the classification of Von Mohl (a German publicist of the earlier nineteenth century); he distinguishes patriarchal, theocratic, despotic, classic, feudal, and constitutional states. Very little examination is needed to see that such classes overlap each other in all directions; indeed attempts of this sort to effect a division that is at once logical and chronological, run the danger of drifting into mere description.

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[1] *Esprit des Lois,* bk. ii, chap. i.

More modern writers[1] undertake a division of states which shall take account not merely of the general location of supreme legal power, but also of the salient features of the organization and structure of the government. Indeed, while accepting Aristotle's division as true as far as it extends, it seems necessary in classifying the states of the modern world to take account of certain especial features of organization the existence of which introduces a fundamental difference between forms of government. Chief amongst these is the distinction between unitary and federal governments. In a unitary government the organs of local authority (provincial and county bodies, etc.) exist by virtue of an express creation, or by tacit recognition from the central government. The latter has power, legally, to terminate their existence or alter their form. The governments of France, Great Britain, and Italy are unitary. The governments of the United States and Germany, on the other hand, are federal. Here both the central and local authorities derive their power from an antecedent source, and neither is legally competent to destroy the other. A further distinction is found in the difference between what is called parliamentary, responsible, or cabinet government, and the form known as non-responsible or non-parliamentary. In the former the executive is virtually appointed by, and holds office during the pleasure of, the legislative body. This is the case in England and in France. In the latter the executive is not appointed by the legislature, and cannot be dismissed by it. Of this character is the government of the United States, of the separate states of the Union, Cuba, etc.

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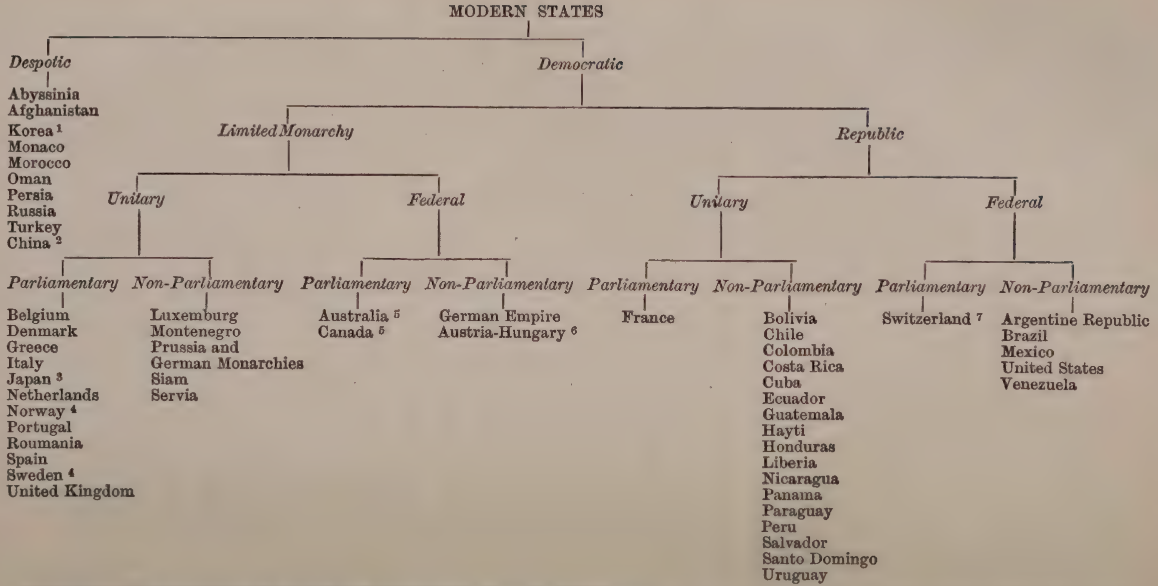
[1] See Gareis, *Allgemeines Staatsrecht;* and Jellinek, *Allgemeine Staatslehre*, chap. xx.

3. Practical Classification of Existing States. In attempting a somewhat elaborate practical classification of states, it seems advisable to make no attempt to include all the historic forms which have appeared in the evolution of the state (city states, feudal monarchies, etc.), but to confine ourselves to actually existing types. It is better also to leave on one side those communities of the modern world, such as China, whose imperfect organization hardly admits of their being called states in the strict sense. In dealing with historic and imperfect forms of the state, no more accurate classification than the original category of Aristotle can be applied without degenerating into mere description. It is well, therefore, to take the primary classification as of general validity, and to supplement it with a more exact category of modern states. In the light of what has been said, the division shown in the table on the following page may be suggested.

The basis of division in this plan proceeds in the first place from the fundamental distinction between despotic and democratic states. In the former the supreme legal power is in the hands of one person; in a democratic state it is in the hands of the majority of the people, or their representatives. This seems the most fundamental of all distinctions; it corresponds to the complete contrast offered by the legal organization of such states as Russia, Turkey, and Persia on the one hand, and those of France, the United Kingdom, and the United States on the other. It seems unfortunate to use the word despotic to indicate the former class, since in the legal sense every state may be said to be despotic. But the term monarchical, or even tyrannical, only leads to worse confusion, and ready-made terminology is seldom felicitous. As a second grouping we have the subdivision of democracies into limited monarchies (governments in which the nominal headship of a personal sovereign is preserved) and republics, in which the chief executive, both titular and real, is the



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[1] Since the treaty of November, 1905, Korea may be said to be under the suzerainty of Japan.

[2] The case of China is peculiar. The emperor appoints his own successor. The laws of the Empire are laid down in the Collected Regulations of the Tsing Dynasty, which prescribes the government of the state to be based on the government of the family. The supreme direction of the empire is vested in the Grand Council. — *Statesman's Year Book*, 1906.

[3] The recognition of the cabinet principle has been in Japan a disputed constitutional point. See *Encyclopædia Britannica*, Supplementary Volume, art. Japan.

[4] For the relation of executive and legislature in Norway and Sweden see Wilson, *The State*, §§ 814, 823.

[5] Considered apart from the rest of the British Empire.

[6] Hungary itself has cabinet government.

[7] The Swiss executive offers a special case. See *Statesman's Year Book*, 1906.

appointee of the people. For evident reasons there is no similar division of despotic monarchies. The further divisions between unitary and federal governments, and between responsible and non-responsible forms, have already been explained. There can evidently be no federal or responsible subdivisions under the despotic group.

4. The Constitution; Written and Unwritten Constitutions. The form of any particular state is called its constitution. In America it is natural to think of the word "constitution" as indicating a written document. But in the wider sense of the term it refers to the fixed fundamental law of any state, whether expressed in a written constitution or otherwise. The following definition is offered by Professor Woolsey:[1] "The collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted is called a constitution." Compare the definition of the distinguished English jurist, Mr. E. Dicey: "All rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state." Of these principles or rules, some may exist in written form in a constitutional document, but others may be of equally binding force though resting for their sanction only on long-standing custom. This is seen particularly in looking at the constitution of England. Some of the most important parts of it are matters, not of statutory enactment, but of customary usage; and this customary usage is to be regarded sometimes as having the aspect of law enforceable by the courts, sometimes merely as an understanding or convention, whose observance is only guaranteed by the force of tradition and of public opinion. The cabinet system, for example, by which the ministers of the executive are selected with the approval of the majority of the House of Commons from among the members of the two houses of Parliament representing a particular political party or group of parties, is the central feature in the practical operation of the British government; it is purely a matter of convention, not of law.

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[1] *Political Science*, vol. i.

Hungary is another country which offers an example of what is commonly called an unwritten constitution. The relations of Hungary to Austria, together with which it forms the dual monarchy of Austria-Hungary, are indeed based upon a fundamental statute (December, 1867) passed in like terms by the parliaments of the two countries, and bearing some analogy to a written constitution. But there is no single constitutional document regulating, or professing to regulate, the internal government of the Kingdom of Hungary. As in the case of England, to whose constitutional evolution that of Hungary offers an interesting parallel, the constitution rests partly on immemorial custom, partly on a series of decrees and statutes,[1] partly on conventional usages. The parliament of Hungary and the county assemblies have existed for many centuries, and their existence is not based on a fundamental written law. Of the decrees referred to, the Golden Bull of Andreas II (A. D. 1222) — restricting the power of the king in favor of the privileges of the barons, and calling for annual parliaments — suggests the Magna Carta of King John. It has been supplemented by numerous other laws, the most important provisions of which were definitely codified in statutes of 1848 and 1867. Any of the provisions of these can legally be abolished by ordinary statutes. It would seem then that the word constitution, if it is to include the organization of such countries as England and Hungary, must be used in a wider acceptation than its usual American signification. To the examples of Great Britain and Hungary there might of course be added the despotic states, such as Russia and Turkey, whose government from the nature of the case is not based upon a written constitution. Theoretically one could conceive of a despotic monarchy resting on a written constitution; one might imagine the social contract as enunciated by Hobbes, operating in the form of a written constitution, under which all the subjects surrendered their power to a despotic king. But inasmuch as, in this instance, the power of the king would extend to the alteration or abrogation of the constitution itself, the latter would be entirely nugatory and the king's real tenure of power would rest in reality on the continuance of the custom of submission.

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[1] Of these the principal are: Golden Bull of Andreas II (1222); the Pacification of Vienna (1606); Pragmatic Sanction of Charles III (1723); Constitutional Laws of 1791, 1844, 1848, and 1867. From the original *Contract of Blood* (no longer extant but dating from the first conquest of the country and securing the rights of the nobles) till the present time about fifty constitutional statutes may be enumerated. See Dareste, F. R., *Les Constitutions Modernes* (2d edition, 1891), vol. i.

5. Origin of Written Constitutions. But among the organized states of the civilized world the number of those which have no written constitution professing to regulate their internal structure is only a very small minority. Within the last century and a half most of the great states have adopted written constitutions. The American colonies, in converting themselves into states, led the way. Written constitutions were adopted in the year 1776 by New Hampshire, Virginia, South Carolina, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina; in the following year by Georgia and New York; and by Massachusetts in 1780. Connecticut and Rhode Island converted their royal charters into constitutions by putting the name of the people in the place of that of the king. France, at the commencement of the Revolution, framed and adopted (1791) a written constitution which, although soon set aside in favor of others equally ephemeral (1793, 1795, 1799), established a historic precedent. Each of the successive French governments of the nineteenth century has adopted a written constitution, — the Bourbon government of the Restoration preferring, however, to avoid the word "constitution" and to substitute for it the term "charter," which seemed to have less flavor of popular sovereignty. The present government in France, — the third republic, — though it has no single document called a constitution, has, nevertheless, a code of "constitutional laws," with a special method of revision. In the Napoleonic era a number of written constitutions were issued under French influence to the tributary Italian states. During the same time written constitutions were declared in Spain both by the Bonapartists, recognizing King Joseph (1808), and by the partisans of the Bourbon Ferdinand VII (1812). Neither of these proved permanent; but Spain is at present under a written constitution presented by the government to a convention, which ratified it in 1876. During the European rising against Napoleon (1813, 1814) written constitutions were promised by Prussia and by several of the states of Germany; after the war they were actually granted by Bavaria (1818) and by Württemberg (1819). The great revolution of 1848 precipitated a shower of written constitutions all over central Europe. Though nearly all of them were canceled in the ensuing monarchial reaction, that of Sardinia (the "Fundamental Statute" of 1848) has remained in revised form as the constitution of the present kingdom of Italy. The king of Prussia issued in 1850 a constitution prepared by the crown and accepted by a legislative body of a reactionary character, which has since, in theory at least, served as the basis of the Prussian government. Austria, in 1867 (defeated in the war with Prussia and Italy, and fearing a disintegration of her heterogeneous provinces), adopted a set of fundamental laws closely analogous to a written constitution. At the present time, then, with the exception of England, Hungary, and the absolute monarchies, the chief European states have written constitutions. The same is true of the republics of Central and South America, all of which have written constitutions, serving at any rate as the nominal basis of their government.

The precedent having been once successfully set in America in the eighteenth century, its extension has been largely a matter of imitation and adaptation. It is interesting, however, to observe the manner in which the institution of written constitutions came about in the United States. In a certain sense the written constitutions of the American states may be looked upon as evolved out of the charters granted by the sovereigns of England to trading companies, and conferring upon them a corporate personality, and, in most instances, commercial privileges or monopolies. These charters themselves were closely analogous to the mediæval charters of privileges given to towns, merchant guilds, or religious orders. Edward IV, in 1463, granted a charter to the merchant adventurers trading with Flanders. Queen Elizabeth conferred a charter (1579) upon the Eastland company trading in the Baltic, and granted another in 1599 to the East India Company. Under James I (1609) a charter was granted to the "Treasurer and Company of Adventurers and Planters of the city of London for the first[1] colony in Virginia." Most important of all is the charter issued by Charles I (1628) to the "Governor and Company of Massachusetts Bay." The Massachusetts charter not only incorporates a "trading company with power to implead or to be impleaded, etc.," but also makes provision for a frame of government consisting of a governor, deputy-governor, and eighteen assistants, and calls for the holding of a "greate and general courte" of the company four times a year. The emigration of the company as an entirety to America (a proceeding not contemplated by the government at the granting of the charter) converted their corporation into a political rather than a commercial body. Though this charter was canceled in 1684, it was replaced by another one (1691) which conceded less independence, indeed, to the colony, but constituted a more purely political instrument. Similar charters with privileges of government were granted to various other American colonies during the period of settlement, though many of them were withdrawn later. At the time of the Revolution colonial charters existed in Massachusetts, Connecticut, and Rhode Island.

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[1] This is the second Virginia charter. The first was granted in 1606. The word "first" is used to distinguish them from the Plymouth Company. See B. Poore, *Charters and Constitutions*, vol. ii.

But although it is necessary to recognize the important part played by trading charters in the evolution of written constitutions, there are other contributory factors which must not be left out of sight. The institution of compacts or joint agreements for self-government among the people themselves played an important part. Of these compacts or "plantation covenants," the history of the settlement of New England in the seventeenth century offers several examples. They were occasioned in part by the isolation in which the colonists found themselves, being cut off from the direct action of the sovereign government to which they acknowledged allegiance; they were also inspired by the ideas on religious organization and government dominant among a large section of the colonists. The latter, being "Independents" in matters of church governance, had already the custom of drawing up a "church covenant," which, being accredited by the members of the congregation, became as it were the constitution of their spiritual government. The most notable of the colonial compacts is the Mayflower Covenant, mentioned in a preceding chapter. A particular importance attaches to documents framed in 1639, and named the "Fundamental Orders of Connecticut," which are practically a political constitution adopted by the towns of Windsor, Hartford, and Wethersfield, which thus combined to form the government of Connecticut. On this was based the later royal charter of 1662, which, as has been seen already, was transferred into a state constitution. During the great rebellion of the seventeenth century in England, the supremacy of the Puritans produced in 1647 the famous "Agreement of the People," intended to be a fundamental written law superior to the power of parliament, and to be ratified by all the nation. A little later (1653) the régime of the Protectorate was consolidated in the "Instrument of Government," drawn up by a council of Cromwell's officers. This latter was a written constitution. But the restoration of the monarchy, theoretically on its old basis, broke up the thread of constitutional development and left it to be brought to a culmination by the American colonists of the next century.

6. The Distinction between States with Written and those with Unwritten Constitutions an Illusory Basis of Division. From what has been said one might reasonably expect that the classification of governments ought to have included the distinction between those that have a written constitution and those that have an unwritten. But such a distinction, self-evident as it appears at first, is in reality illusory and unsatisfactory. In the first place no constitution is wholly an unwritten one. Thus in the case of the United Kingdom certain parts of the constitution undoubtedly consist of written documents; the Magna Carta, the Bill of Rights (of 1689), the Act of Settlement (1701), and the statutes of 1832, 1867, 1884, and 1885, regulating the right to vote and the representation of the people, are evident examples. Nor does a so-called written constitution of necessity, or even usually, contain the whole of the fundamental law of the country to which it applies. Any constitution is soon found to become surrounded in its operation with a growth of precedents and customary usages which presently obtain what is practically a binding force, and which become in time a part of the constitution in the same sense. The most familiar example is seen in the case of the presidential office in the United States, a third term being forbidden by precedent, though not repugnant to the written constitution itself. A good illustration of the same thing is seen in the government of Italy: the "Fundamental Statute" does not prescribe the necessity of a cabinet system, — of ministers dependent as in England on the approval of a parliamentary majority, — but the precedent set by Victor Emmanuel I has been consistently followed, and now the system [1] is looked upon as a part of the constitution of the kingdom of Italy.

There are further reasons of still greater cogency for refusing to group together the countries with paper constitutions as forming a class. It is commonly considered that a written constitution stands as a barrier against the arbitrary action of the government, the supposition being that since the powers of the government are limited and defined by the constitutional instrument, any action of the government outside of its legal province is void. Such is of course the case with the Constitution of the United States. But it is a confusion of thought to suppose that this is a necessary consequence of the existence of a written constitution. The existence of such restrictions on the actions of the government does not follow from the mere fact of there being a written constitution, but depends on the question whether or not the provisions of the constitution are alterable by the ordinary legislative procedure of the government. In the United States this is of course not possible; Congress has no power to widen its own jurisdiction. But one can imagine a written constitution, alterable by the ordinary method of legislative enactment. This is precisely the case with the constitution (the Fundamental Statute) of the kingdom of Italy; there is no part of it that cannot legally be altered by an act of the Italian parliament. In spite of the existence in the one country of a written constitution, and its absence in the other, the fundamental law of Italy stands on the same footing as that of the United Kingdom. It is the force of custom and public opinion, not any legal check, that limits the power of the existing governmental body. It seems, therefore, that to class Italy and the United States together, and contrast the two of them with the United Kingdom, is to proceed from a purely artificial point of view. The division of governments into those that have and those that have not a paper constitution, is quite misleading.

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[1] For the special features of cabinet government in Italy, see Lowell, A. L., *Government and Parties in Continental Europe*, vol. i, pp. 151–154.

Even apart from the question of amendment or alteration of the constitution, a feature of essential importance is the validity or enforceability of the constitutional restrictions. In the case of the United States, a constitutional limitation is rendered valid by the peculiar power entrusted to the American courts. An act of Congress which goes beyond the constitutional powers of that body becomes inoperative by the decision of the judiciary, to which the executive and legislative branches of the government defer. In this arrangement, which will be discussed more fully in a later chapter, lies the true guarantee of the American Constitution, and it is this fact, and not the mere fact that the Constitution is a written one, which offers such a special safeguard to public liberty. But this is a feature quite peculiar to the American system. The courts of Europe have no such function, and the individual has no such guarantee. The example of the Prussian constitution is a case in point. Between the years 1860 and 1865 a struggle was carried on between the king of Prussia (acting under the advice of Bismarck and anxious to increase the expenditure on the army) and the House of Representatives elected under the constitution. The constitution nominally places the control of finance in the hands of the parliament, declaring that "taxes and dues for the treasury of the state can be levied only as they are set down in the budget or ordained by special laws" (art. 100, constitution of 1850). The king, finding it impossible even after recourse to a dissolution, to bend the House of Representatives to his will, passed his budget through the House of Peers, and collected the taxes without any sanction from the lower house. This was of course a gross violation of the constitutional provisions. Under the American system any individual citizen thus taxed could have appealed to the courts for protection. But the Prussian system does not permit of any such recourse, and although the House of Representatives made formal protest, it had no power to stop the illegal proceedings of the executive. For the reasons thus cited — that no constitution is wholly unwritten or wholly written, that even in a written one the vital part of the matter lies in the process of revision, and in the relation of the courts to the constitution — it is well not to attach too much importance to the formal distinction between paper constitutions and constitutions relying on custom.

7. Scope of the Constitution. In the next place there is to be considered the scope and extent of what is properly to be called the constitution of a state. To harmonize with the definition given above, it should contain those principles according to which the powers of the government, the rights of the governed, and the relation between the two are adjusted. This is not the case with all written constitutions; many of them contain regulations too minute and of too little importance to be classed as true fundamental law. This feature is particularly noticeable in the present constitutions of the states of the Union. Their provisions cover not only the fundamental regulations of the structure of the government, but a great many other things as well. Thus the constitution recently adopted in Alabama (1901) contains specific provisions in reference to the procedure of the legislature, the enumeration of thirty-one different classes of private and special legislation prohibited to the legislature, and refers to a number of miscellaneous matters such as banking, railroad freight rates and passes, and the Alabama Polytechnic Institute. This is typical of modern American constitutions, which have tended constantly to become more and more lengthy and explicit. The New Hampshire constitution of 1776 contains 600 words, the constitution of Missouri of 1875 about 26,000, and the present constitution of Alabama about as many. The reason for this lies in the alteration of public opinion in reference to legislative bodies in general. A hundred years ago the legislature was the object of unlimited popular confidence and seemed to embody in itself the sovereign power of the people. The experience of a hundred years has shown the possibility of corruption in the legislature itself, and popular distrust has led to the attempt to safeguard the people from venality and corruption on the part of their representatives. The result is that in a certain sense many of the provisions of American constitutions are not of the nature of fundamental law.

It thus becomes a little difficult to say with accuracy just what the words "constitutional law" should mean. If the phrase is taken in a purely literal sense to mean the law contained in a written constitution, we omit the accompanying customary usages and judicial interpretation, and include much that is in the constitution but is not fundamental. For example the article (No. 51) of the constitution of Switzerland which declares that the order of Jesuits is not allowed in Switzerland is only constitutional law in the sense that it is in the constitution. In the case of a country with a customary constitution, "constitutional law" means all such customs, common law, and statutes as are of a fundamental nature. This is of course a definition in a circle, yet the sense conveyed is fairly obvious. In the

United Kingdom, for example, the acts of Parliament of 1832, 1867, 1884, and 1885, regulating the representation of the people, are constitutional law; the factory act of 1901, though passed in the same way by the same authority, is not.

8. Amendment. Something must be said in conclusion in regard to the alteration or amendment of a constitution. In such countries as England and Hungary, revision or alteration is effected by the ordinary legislative process. The same is true of certain countries with written constitutions, such as Italy. Some written constitutions make no explicit provisions for revision, as that of Württemberg (1819) and the French "charters" of 1814, 1815, and 1830. In these cases it is to be presumed that the ordinary legislative process includes the revisionary power. But in the great mass of written constitutions a special method of revision is prescribed, in all cases necessitating a more deliberate and difficult process than the passage of an ordinary law. The German federal constitution (art. 78) allows revision by ordinary legislative process, with the provision that fourteen votes in the upper house are sufficient to defeat the amendment; inasmuch as Prussia has seventeen votes, the article precludes any revision without the consent of the king of Prussia, in other words, of the German emperor. Various devices are adopted in other constitutions, — the election of a special parliament on the issue of the revision (as in Spain), the reiteration of the demand for revision by successive legislatures (French constitution of 1791), etc. The systems at present in force in France and the United States present contrasted extremes of simplicity and difficulty of revision. In France a revision can be adopted in a joint session of the Chamber of Deputies and the Senate, a provision originally framed in the hope of easily converting the republic into a monarchy. The natural objection to such a simple process of amendment is the absence of security against premature and ill-considered change. In the United States, on the other hand, the process is so difficult as to be almost impossible.[1] It is true that the Constitution has been amended fifteen times, but an analysis of the circumstances under which the changes were adopted show that in a certain sense the Constitution has never been amended. Thus the ten amendments which constitute the "Bill of Rights," or the protection of individual liberty against the action of the government, are really part of the Constitution itself. They were appended in accordance with an agreement that was reached at the time of the ratification of the Constitution itself and designed to meet the objections raised in Massachusetts and elsewhere against the possible sacrifice of individual liberty under the new national government.[2] The Eleventh and Twelfth amendments, in reference to bringing suit against a state and to the method of electing the President, are merely in rectification of oversights, and contain no real departure from the intention of the makers of the

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[1] See Constitution of the United States, art. v, already quoted in Chapter IV, p. 58. "It would seem," says Woodrow Wilson in his *Congressional Government*, "that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment erected in Article i."

[2] See Fiske, *Critical Period of American History*.

Constitution. The Thirteenth, Fourteenth, and Fifteenth amendments, prohibiting slavery and attempting to give equal political status to whites and blacks, only received the required ratification by three fourths of the state legislatures as a consequence of the Civil War and the "reconstruction" of the Southern governments.[1] The system may therefore fairly be criticised as too cumbrous for practical use.

But the most important of all present methods of constitutional revision is by a more direct action of the people than any of the plans mentioned above. The calling of a representative convention elected expressly for the purpose of making a constitution may be looked upon as the typical American system; such a constitution is in nearly all cases submitted to ratification by popular vote. Constitutions promulgated directly by the conventions themselves (as for example in South Carolina, 1895, and in Delaware 1897), are nowadays quite exceptional. It is especially interesting to compare with the process of amending the Constitution of the United States the methods of revision existing in the federal governments of Switzerland and the commonwealth of Australia. In Switzerland (constitution of 1874) a constitutional amendment passes through both houses of the legislature, a simple majority being sufficient, and is then submitted to the vote of the people; it must be ratified by a majority not only of the votes but also of the different cantons that form the confederation. It is further provided that a demand for a revision of the constitution made by either branch of the legislature, or by the petition of fifty thousand voters, must be followed by a popular vote on the desirability of undertaking a revision. The method of amendment adopted under the federal constitution of Australia is closely similar. Proposals for amendment are made in the legislature, and after passing both houses by an ordinary majority are submitted to the people. To be adopted they must obtain a majority of the votes cast as a total and be carried in a majority of the states.

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[1] See Curtis, *Constitutional History of the United States*, vol. ii.

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PART II

THE STRUCTURE OF THE GOVERNMENT

CHAPTER I

THE SEPARATION OF POWERS

1. Nature of Executive, Legislative, and Judicial Power. — 2. Theory of the Separation of Powers; Montesquieu. — 3. Influence of this Theory in America and France. — 4. Extent of its Application in Existing Governments. — 5. Continental Administrative Law. — 6. General Criticism of the Theory of the Separation of Powers.

1. Nature of Executive, Legislative, and Judicial Power. In the first part of the present volume we have been concerned with the discussion of government as a whole, and with the relations of the entire machinery of the state to the individual. The purpose of this and the following chapters is to analyze in detail the structure of government. For this a starting-point is found in the division of governmental powers between legislative, executive, and judicial bodies. Every government that occupies more than a quite primitive or limited sphere finds itself called upon to perform duties of a varying nature. There is, for example, a very evident difference between the functions exercised by a member of a legislature, those of a revenue officer, and those of a judge. In the first place the government has duties to perform that are legislative and consist in the making of laws; a parliament, a city council, or a constitutional convention is a legislative body. This function, though of scant importance in primitive society (in which the idea of deliberate lawmaking is hardly known), is of vast importance and a matter of constant necessity under the complex conditions of modern life. In a certain sense, inasmuch as the making of the law is logically antecedent to its execution and to decisions as to its meaning, the legislative function is the chief of the powers of government. "The legislative power," says Judge Story in his "Commentaries on the Constitution," "is the great and overruling power in every free government." Looked at in a purely theoretical light, the executive function of the government (the carrying out of the law) appears in a quite mechanical and secondary aspect. In point of fact, however, the functions of the executive branch of the government are of great importance. No matter how explicitly laws are made, they must of necessity leave a wide discretionary power in the hands of those who enforce them; in many matters — most notably in relations with foreign states — the executive branch of government must act without explicit instructions, and is no longer to be regarded as merely the agent of the legislative branch of the government. The organized physical force — armies, navies, police, etc. — is at the command of the executive, — is, in a sense, a part of the executive. It is with the executive (in the shape of police, revenue officers, postmasters, etc.) that the individual citizen is chiefly in contact. Indeed in any modern government the executive, even apart from the army and navy, vastly outnumbers the two other branches. The executive civil service of the United States includes over 300,000 positions; there are less than 140 federal judges and only 476 members of Congress. The judicial organs of a government, whose function it is to pronounce as to the application of the law to existing cases, though like the executive theoretically inferior to the legislature, exercise in reality a function of the greatest consequence to the citizen, and, in the case of the United States, a function of a peculiar constitutional importance.

2. Theory of the Separation of Powers. At the beginnings of modern democratic government, and in particular in the political writings of the eighteenth century, it was a cardinal doctrine of political science that these three branches of government, the legislative, the executive, and judicial, should be kept separate from one another. A different body of persons was to administer each of these three departments and neither body was to have a controlling power over either of the others. It was thought that in this way a peculiar guarantee, indeed the only adequate guarantee, might be given to public liberty. This is what is known as the theory of the separation of powers. It is not meant that this theory was altogether new in the eighteenth century. We find traces of it as far back as Aristotle; and Polybius in the sixth book of his "History of Rome," in which he treats of the Roman constitution, describes in detail and with approval the balanced powers intrusted to the senate, the consuls, and the tribunes. It was natural, however, that with the decline of monarchical absolutism and after the great object-lesson of the English revolution of 1688, constructive theories pointing towards possibilities of popular sovereignty should receive especial attention. At the hands of Montesquieu, author of the "Spirit of Laws" (1748), the theory met with a definite and emphatic presentation, destined to give it a lasting influence on subsequent political institutions. "If the legislative and executive power," says Montesquieu, "are united in the same person or in the same body of persons, there is no liberty, because of the danger that the same monarch or the same senate may make tyrannical laws and execute them tyrannically. Nor again is there any liberty if the judicial power is not separated from the legislative and the executive. If it were joined to the legislative power, the power of the life and liberty of the citizens would be arbitrary; for the judge would be the lawmaker. If it were joined to the executive power, the judge would have the force of an oppressor."[1] A similar judgment is expressed by the great English jurist, Blackstone, in his "Commentaries on the Laws of England" (1765). "In all tyrannical governments the supreme majesty, or the right both of making and enforcing laws, is vested in the same man or one and the same body of men; and when these two powers are united together there is no public liberty." Both of these authors are led to the statement of the theory of distributed powers from their analysis of the British constitution. At the time at which they wrote the cabinet system was only in the earlier stage of its development. The junction of both the virtual executive and the legislative power in the hands of a cabinet or committee chosen out of the legislature was not the evident fact that it is to-day. A British ministry of Montesquieu's time was still not a unit: it allowed of divergence of opinion among its members; nor did the latter all take office or leave it at the same time. Montesquieu, therefore, somewhat excusably overlooked what has since become the leading fact of the British constitution, and thought to see in it a balance of power effected between the king and the two houses of Parliament, neither of whom was supreme over the other, and from each of whom the judiciary was to a large extent independent. Blackstone, viewing the constitution only as a lawyer, knows nothing of a cabinet. The ministry as known to the law even at the present day are the appointed servants of the crown. The fact of their political unity and membership of the legislature is only a matter of custom, not of law.

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[1] *Esprit des Lois*, bk. xi, chap. vi.

3. Influence of this Theory in America and France. The doctrine of public liberty effected by distribution of power became thus almost an article of faith with political writers of the eighteenth century. The fact was of vital importance for the history of the United States. At the time of the establishment of the state governments the doctrine was put into practice by the separation, not of course complete, but yet far reaching, of the different branches of the government. The independent election of state governors and legislatures, the absence of the power of dissolution, were embodied in the state constitutions, and have remained as fundamental parts of the American system of government. That the adoption of this plan was conscious and deliberate is seen in the often quoted passage of the Massachusetts constitution of 1780 (part i, art. xxx): "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

The same theory exercised the greatest influence over the convention of 1787, in which the federal constitution was framed. Its members recognized, indeed, the need for a modification of the rigidity of the doctrine of separation, but in the main they accepted it and made it the basis of the Constitution of the United States. "The accumulation of all powers," says the "Federalist" (the set of essays written in defense of the Constitution by Hamilton, Madison, and Jay), "legislative, executive, and judicial, in the same hands, whether of a few or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny."

The fact that even the state constitutions of 1776 and 1777 and the federal constitution of 1787 do not adopt an absolutely complete separation of powers of government, naturally suggests the question in how far such a separation would be possible, and what would be implied by a complete adoption of the principle. It would mean a constitution constructed on such a plan as the following: A legislature elected directly by the people, a set of executive officers either elected by the people (independently of the action of the legislature) or appointed by some person or body of persons elected by the people; judges similarly elected and independent as to their tenure of office and emolument of both the legislature and the executive. Even then it might be questioned whether the liability of executive officers to be tried before the judiciary for breaches of official duty or violation of their legal powers, would not be at variance with a logically complete separation; this, however, will be considered later in dealing with the administrative law of Continental Europe. But granting such a separate election and independent tenure of office on the part of the three departments of government, there would still remain a sense in which the separation would not be complete, in which indeed it can never be complete without a *reductio ad absurdum*. The law enforced by the executive and adjudicated on by the courts would still be the law made by the legislature. It is to be noted also that such law might conceivably be extremely tyrannical and unjust. The executive and the judges would still have to apply it, and thus the separation of power in and of itself would offer no guarantee of individual liberty.

The theory of separation obtained during the revolutionary era in France an influence no less marked than in the United States. The constituent assembly of 1789 adopted it as a fundamental principle in their construction of a new government. The sixteenth article of the formal Declaration of Rights with which they prefaced their constitution, declares, "Every society in which the separation of powers is not determined has no constitution." In accordance with this general principle, the constitution established a legislature not dissolvable by the king, forbade the ministers and other executive officers to hold seats in the legislature, gave to the king no right of initiative, and only a partial veto power, and instituted judges elected by the people. The later constitution of 1795 modified the separation by instituting a plural executive, — the Directory, elected by the legislature itself.

4. Extent of its Application in Existing Governments. In the course of the nineteenth century the theory of separated powers has lost a great deal of its former credit. The conspicuous example of the British constitution invalidates it as a universal proposition. Here the development of the cabinet system since Montesquieu's time has thrown the virtual direction of both legislative and executive power into the hands of the same body of men. Yet it would be absurd to say that public liberty in the United Kingdom has thereby been sacrificed. As the British constitution now stands, the group of eighteen or twenty persons who compose the cabinet have the conduct of the executive government. They also direct the course of legislation, since a majority of the predominant part of the legislature — the House of Commons — are prepared to support their measures. Should they lose that support they resign their office. Thus the very contrary of the idea of divided powers seems to be the case. The executive officers remain such only so long as they retain the legislative power. The legal theory of the constitution, on the other hand, still offers the spectacle of more or less opposing powers mutually balanced, — the king and his ministers (appointed, in the theory of the law, according to his pleasure, and being merely his servants) conducting the executive government, while the houses of Parliament make the laws. The analysis of the British government given by Walter Bagehot, the distinguished economist and essayist, in his "English Constitution" (1867), has served to show how completely the development of cabinet government has rendered the earlier view of the British constitution inapplicable to the present situation. In certain other respects the British constitution offers in actual fact some features of distributed powers, the most notable being that of the tenure of office of the judges, who are made virtually independent by being appointed for life or good conduct.

Nor is there a separation of powers observed in the present parliamentary governments of France and Italy. In France the president is elected by the legislature. His ministers are, in practice, though not in law, the representatives of a majority in the Chamber of Deputies. In the same way the king of Italy governs by means of a party ministry. In Germany, in the actual working of the federal constitution, the powers of government are not distributed. The German emperor holds the executive power of the federation. In his capacity of king of Prussia he has also a very great share of legislative control. In the first place there are many measures[1] — those introducing any change of existing regulations concerning the army, navy, customs, and excise — which cannot be enacted without the consent of his appointed delegate in the Bundesrath or upper house of the legislature. Through the same channel he enjoys an initiative power for any kind of legislation, the control of seventeen out of fifty-eight votes in the Bundesrath, and a veto upon constitutional amendments.

Even under the Constitution of the United States, the principle of distributed powers is only adopted in the federal government to a modified extent. The executive is not without a share in legislation, since the President has a partial veto power on the acts passed by the Congress, and something resembling a power of initiative by means of presidential messages. Nor is the legislature without share in the executive government, as is seen in the ratification by the Senate of treaties and appointments. The judges are the appointees of the executive, and the courts are empowered to pass on the constitutionality of the acts of the two other branches of the government. Even this qualified separation existing under the law of the Constitution is still further modified in the actual operation of the government. Here the existence of the party system is an important factor. Though standing outside of the legal machinery of the government, it none the less acts as a bond of union between the legislature and the heads of the executive government. Whenever the executive and the majority in the houses of Congress are of the same political party (as has been continuously the case, for instance, between the years 1895 and 1907), they are under the guidance of common councils, and are united in the pursuit of the same ends. It is possible, indeed, to look upon the singularly systematic and powerful growth of the party system in the United States as a sort of "natural" evolution consequent upon the attempt to keep apart the powers of government; an attempt, as it were, on the part of nature to rectify an error in organic structure, a process analogous to the healing of a fractured limb.[1] In the state governments the separation of powers is more nearly complete. The separate election by the people of the governor and other executive officers, the legislature, and the judges, is the prevalent constitutional arrangement. The partial veto power given to the governor in nearly all the states of the Union,[1] and the governor's right of sending messages to the legislature, are a departure from the rigidity of the doctrine. In all the states, too, the courts have cognizance of the official acts of the members of the government.

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[1] Federal Constitution, articles xxxv and xxxvi.

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[1] See F. Goodnow, *Politics and Administration.*

5. Continental Administrative Law. In the countries of continental Europe an application of the principle of separation is made quite contrary to American ideas of government. The officers of the government acting in their official capacity cannot be brought to account before the ordinary courts of law; nor can the courts question the validity of an act of the legislature. Such a system professes to rest on the principle of the separation of powers, by protecting the executive and judiciary from the control of the third branch of the government. The protection, however, is only afforded at the expense of the individual citizen, the practical effect of this fallacious form of separation being to strengthen very much the hands of the executive. The peculiar relation thus established between the executive and judicial branches of the government will be treated more fully in a later chapter.

6. General Criticism of the Theory of the Separation of Powers. It remains to consider, in conclusion, to what extent the theory of the separation of powers is to be regarded as true. Stated in the form of a universal principle, as by Montesquieu and Blackstone, in the quotations above, it is undoubtedly false. It is not true that there cannot possibly be public liberty where executive and legislature are joined in the same hands. The example of Great Britain alone amply proves this. Nor is it true either that the separation of the powers of government of necessity guarantees the individual against possible tyranny, establishes in and of itself a government "of laws and not of men." A single government board or body of directors need not *of necessity* act tyrannically; nor does it follow that an executive officer and a legislative council elected and acting separately will *of necessity* act in the public interest. But though no such universal formula can be laid down, it remains true that in the actual conduct of public affairs a certain degree of separation of powers makes towards efficient government. The divergent requisites in the composition of executive and legislative bodies will be treated in the next chapters; it is apparent, however, that absolute identity of the two is not to be recommended. The separation of the judiciary to the extent at least of independence in tenure of office is admitted by all to be desirable. The question of the advisability of establishing an executive controllable by the legislature (as in the cabinet system of Great Britain), or of following the system adopted in the state governments, is a disputed point. Its solution will depend upon the particular circumstances and the historical antecedents of each community. Americans are inclined to look with favor on the system of popular election of state officers. Such writers as A. Lawrence

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[1] The governor has a partial veto in forty-one of the forty-five states. The exceptions are Rhode Island, Ohio, Delaware, and North Carolina. See Professor A. B. Hart, *Actual Government*, pp. 136, 137.

Lowell in his "Essays on Government" and John Fiske, "Civil Government in America," have ably argued in defense of the American plan. The English, on the other hand, are inclined to view the union of powers in the hands of the cabinet as the most admirable feature of their system of government.

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CHAPTER II

THE LEGISLATURE

1. The Legislature; General Requisites, Procedure, etc. — 2. The Bicameral System; Reasons for its Adoption. — 3. Composition of Upper Houses. — 4. Distribution of Power between the Two Houses. — 5. Direct Legislation; the Initiative and the Referendum.

1. The Legislature; General Requisites, Procedure, etc. It has been said in the preceding chapter that there is a necessary diversity in the composition of the different branches of the government to meet the distinctive requirements of each. The executive is concerned with action more than deliberation; promptness and unity of purpose are the prime requisites. For the judiciary, the technical knowledge of the actual law to be applied, and a trained logical faculty to be used in its application are above all necessary. The legislature, on the other hand, demands an entirely different set of qualities. The legislature is, par excellence, a deliberative body, and for deliberation two heads are better than one, and two hundred are better than two. A legislative body must consist of many persons, representing numerous interests, various points of view, and different sections of the community. No precise size can be indicated as proper for a legislature; as numbers increase the gain in added wisdom is offset by the increased cumbrousness. The French constituent assembly, called in 1789, consisted of nearly 1200 members. This was the largest legislative body of modern times, and was found hopelessly unwieldy. Of the popularly elected legislatures of the world, the House of Representatives at Washington contains 386 members, the British House of Commons 670, the French Chamber of Deputies 584, the German Reichstag 397, the Italian Deputies number 508, and the Spanish Congress has 431 members. The number of members in the state legislatures of the United States varies very much. New Hampshire has 390, Massachusetts 242, and Virginia 100 in the lower house, while Delaware has only 34, and Rhode Island 72.

It is hardly possible to accomplish the work of actual legislation among such large bodies of men, without the adoption of definite plans and systems of procedure. Any large gathering which acts at haphazard and without formal rules is liable to become a mere babel of tongues; its resolutions, to use Mr. Bagehot's phrase, get "wedged in the meeting." This was the case with the French Assembly of 1789, already referred to, which in its first enthusiasm was inclined to proceed "according to the promptings of the spirit," rather than to follow any formal plan. They rejected the suggestion that they should adopt the standing orders of the House of Commons. "They discuss nothing in their assembly," wrote Gouverneur Morris, at that time in Paris, and an interested observer of their proceedings. "One large half of their time is spent in hallooing and bawling." Universal experience has therefore shown the need of what is called legislative procedure, a definite method of doing business which the legislature adopts as part of the necessary formality of the making of a law. Such rules have been adopted by all the chief legislatures of the world. They are of course made by the legislature itself, and can consequently be set aside if need be in moments of stress. The objects aimed at are the orderly and efficient dispatch of business, the prevention on the one hand of precipitate and ill-considered action, and on the other, of fruitless prolixity of debate. The rules thus adopted tend to be extremely intricate and confusing by reason of the vast amount of business that tries to force itself upon a modern legislature. Mr. Bryce in his "American Commonwealth" tells us that an industrious member of the House of Representatives needs one whole session to learn the rules of procedure.

A few general features of procedure adopted in most legislative bodies may be mentioned. The most important is the device of requiring a bill to be voted on, not once and for all, but at three separate "readings," or intervals of time. This is intended to prevent the legislature from acting on the spur of the moment, and committing itself to a measure under the influence, perhaps, of momentary emotion. In the British House of Commons, "the member who desires to introduce a measure gives notice . . . of his intention to do so. When the motion comes on in its order, he moves for leave to introduce a bill. . . . An order of the House is made that the bill be prepared and brought in by the mover and other members named by him. The bill may then immediately be presented, which is done by the member appearing at the bar, whereupon the Speaker calls upon him by name, he calls out, 'A bill, sir,' and is desired by the Speaker to bring it up. He brings it to the table and delivers it to the clerk of the House, by whom its title is read aloud. The questions that a bill 'be now read a first time,' and that it be printed are put without amendment or debate; an order is then made that it be read a second time on a day named." On this day the bill is again brought up, and a vote taken on the question that the "bill be now read a second time;" having successfully passed this stage it is referred to what is called a committee of the whole House; here it is discussed, voted on clause by clause, and probably amended. At the conclusion of this stage a day is set for the final consideration of the bill; the bill is presented in its revised form to the House, and unless further amendents are now carried, it is submitted to its third and final reading. Even after this the bill may have to be reconsidered if amended in the Upper House.[1]

Another device of legislative procedure is the delegation of the work of the legislature to a series of committees. The aim of this is to facilitate the dispatch of business, and to enable the legislature, by dividing itself into sections, to multiply its powers of work. The system has been most completely developed in the House of Representatives. Here the so-called first and second readings are a purely perfunctory matter, and mean the reading of the title by the clerk. After this the bill is referred to the appropriate standing committee. These are nominated by the speaker, and are representative of both the great political parties. In the Fifty-Ninth Congress there are over thirty standing committees of the House of Representatives;

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[1] Anson, *Law and Custom of the Constitution*, part i, chap. vii, sect. ii, § 2.

the committees on Ways and Means, on Appropriations, on Banking and Currency, on Commerce, on Claims, Manufacturing, Pensions, etc., are among the most important. The great majority of bills never survive their reference to a committee ; the committee, though it has no formal power to negative a bill, destroys them either by making an adverse report or by introducing another bill as a substitute or by simple neglect. Such a system, accompanied as it is by stringent rules of debate, tends of course to remove the actual conduct of business from the House itself, and to discourage independent action on the part of individual members. The French Cabinet of Deputies adopts the peculiar system of dividing its members by lot into eleven sections or panels; out of these a special committee is elected (by the members of the panel) for each bill that is presented. Such a plan is plainly unsatisfactory, as it does not accord with the system of cabinet government supposed to operate in the French legislature. The hazard of the lot may lead to government bills being handed over to opposition committees. It is easier, however, to see the faults in legislative procedure than to suggest adequate remedies.

A further point of importance in the conduct of legislative business is the need of some method of forcibly bringing the debate to a close. The procedure of most assemblies allows means whereby a vote may be taken on the question of terminating the discussion and voting on the matter under consideration. To this general rule the Senate of the United States is an exception ; it has been a part of the traditional dignity of that body not to interfere with the freedom of discussion by closing the debate.[1] In the House of Representatives, however, the closure of the debate, the "previous question," as such a motion is called, may be moved by any member, and is carried if supported by a majority of those present. Until quite recently the British House of Commons had no such rule. It happened, however, that during Mr. Gladstone's second administration (1880–85) the Irish members took advantage of this fact to block all parliamentary business by talking against time. This has rendered it necessary for the House somewhat reluctantly to adopt a rule of closure (standing order of 1882, revised 1887). Under the present regulations a motion can be made for terminating the debate; the speaker is allowed to use his discretion as to whether or not he will submit the motion to a vote. A similar purpose is effected by what is called the "closure by compartments" or "the guillotine," which consists in a resolution of the House either altogether precluding discussion on certain clauses of a bill or limiting the time to be allotted to the bill or to parts of it. This rather drastic form of procedure was applied in the case of the Home Rule Bill, which narrowly passed the Commons in 1893.[2]

2. The Bicameral System; Reasons for its Adoption. Of all the means that have been used to secure, in the work of legislation, a due amount of caution and reflection, the most important is the division of the legislature into two parts, creating thus what is called a two-chambered or bicameral legislature.

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[1] In reference to the closure of debate in American Legislatures, see Hart, *Actual Government*, § 116.

[2] See Anson, *Law and Custom*, part i.

It is not meant that the desire to avoid precipitate action is the sole reason for establishing a legislature of this sort; it will presently be seen that it often serves other purposes as well, but such is none the less the main ground on which the separation of the legislature into two parts is to be defended. At the present time the bicameral system is of almost universal prevalence. The United States, the United Kingdom, France, Germany, and all the chief countries of Europe have bicameral legislatures. The kingdom of Greece alone vests the legislative power in a single chamber (the Bulé). Mexico and the South American states have copied the United States in establishing "congresses" composed of senates and houses of representatives, in some cases (as in Brazil) denominated chambers of deputies. Even in the subdivisions of federal governments the bicameral structure of the legislature is often found. All of the forty-five states of the Union have legislatures consisting of a senate and another house. In Canada two of the provinces (Quebec and Nova Scotia) have an upper and a lower house, and the "states" of the commonwealth of Australia, and the different kingdoms, duchies, etc., which make up the German federation have all double legislatures. Japan, in reconstructing its government in the light of European experience in 1889, deliberately set up a bicameral system.

The objections, indeed, against a unicameral system are of overwhelming force. "Of all the forms of government which are possible among mankind," writes the distinguished historian W. E. H. Lecky, "I do not know of any which is likely to be worse than the government of a single omnipotent democratic chamber."[1] Mr. Lecky undoubtedly states the case too strongly. The fact remains, however, that the unicameral legislature has been tried and found wanting. A single legislative house, unchecked by the revising power of another chamber associated with it, proves itself rash and irresponsible; it is too much exposed to the influence of the moment; it is swayed by emotion, by passion, by the influence of oratory; it is liable to a sudden access of extravagance or of retrenchment. But quite apart from these more or less psychological arguments, there are other practical objections to a single legislature. Elected (in most cases) all at the same time, its members represent the opinions of the community at a particular moment and on particular issues. But the lapse of time and the appearance of new public questions may render a legislature such as this quite out of harmony with public opinion long before its term has expired. A somewhat natural confusion of thought tended in the past to confound the existence of a single legislative chamber with the principle of popular sovereignty, as if the rule of the people would not allow of the existence of a second house. Such a confusion arose from the historical fact that in its origin the British House of Lords was an aristocratic institution. As a consequence of this, the democrats of the French Revolution adopted (1791) a legislature of a single house; the proposal to unite it with an upper chamber was rejected in the Constituent Assembly as savoring of aristocratic ideas. The same error was committed in 1848 in the constitution of the second French republic.

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[1] *Democracy and Liberty.*

The abortive German parliament of 1848 consisted of a single house. Even in the United States unicameral legislatures have been tried. Georgia and Pennsylvania in 1790, and Vermont in 1836, successively abandoned the system in favor of the now universal double legislatures. The idea that the existence of a second branch of the legislature is not compatible with popular sovereignty is indeed purely fallacious. The two houses may each of them draw their power from the people, although elected for different terms and by different districts. The division between the two need not in any way imply the existence of caste, or follow the line of the social stratification of society. The senates of the United States and France are obvious illustrations.

3. Composition of Upper Houses. Granted the need of the existence of an upper house, the next point to be considered is the manner of its composition. It may be here incidentally mentioned that the term "upper house," familiarly used to refer to a particular part of the legislature, is of course at the present day a misnomer. In the matter of constitutional power the so-called upper house is in nearly all cases the weaker of the two. The term is merely a historic one; for lack of a better, it is still convenient to retain its use. The composition of an upper house may be based on the principles of hereditary office, of appointment, of election, or on a combination of these. Let us consider these different methods in turn. The hereditary principle as applied to the political construction of the future need not be taken seriously. It is not probable that any civilized community, not already having a hereditary legislature, will deliberately bring one into being. It is true that the principle was used to some extent in the creation of the House of Lords in Japan (1889), but rather as a recognition of social and political differences already existing than as a creation of new ones. "The idea of hereditary legislators," wrote Thomas Paine in his "Rights of Man" (1791), "is as inconsistent as that of hereditary judges, or hereditary juries, and as absurd as an hereditary mathematician, or an hereditary wise man, and as ridiculous as an hereditary poet-laureate." It is one thing, however, to object to the hereditary principle in the construction of a new legislature, and another to demand its abolition where it already exists. In many countries it has had its origin in the historic evolution of the government, it corresponds to the social distinctions which exist as an undeniable fact in the structure of the community, and it operates on the whole fairly well. Such is undoubtedly the case with the British House of Lords. There is at present no very intense opposition to the continued existence of the house: true, the radicals and the socialists demand its abolition, and many liberals, such as Lord Rosebery and Mr. Gladstone, have threatened it with reform. But the opposition to it from the liberals has arisen rather from the fact that the House of Lords is overwhelmingly and hopelessly conservative than from repugnance to the nature of its structure.

The British House of Lords is based, indeed, on the hereditary principle to a larger extent than any existing legislature. It contains in all about six hundred members (the number varying through deaths and new creations of peerages). Of these only four are members appointed for life, — the four eminent jurists who are created lords of appeal, to supply the House with proper legal knowledge when sitting as a court, — twenty-six are archbishops and bishops of the Established Church, sixteen are elected by the Scotch peers from among their number, twenty-eight are elected by the Irish peers, and the rest are the members of the peerage of the United Kingdom. The creation of a peerage carries with it the hereditary right to a seat in the House of Lords, nor has the crown the power to make life appointments other than the four mentioned above. The Continental legislatures which make use of the hereditary principle apply it only in a partial degree to the composition of the upper house. Along with the princes of the blood and the hereditary members, there are included a large number of members appointed by the crown for life only. This is the case with Prussia, Austria, Hungary, and Spain. But of these it is only in Hungary that the hereditary peers form a majority of the house. In Spain and Austria a representation is also given to the Roman Catholic Church; in Hungary the Greek, Protestant, and Roman Catholic churches are all represented in the upper house; the clerical representation is in all cases very much in the minority. The Prussian House of Lords includes a number of elected members representing the land-owners, together with representatives of the universities, the mayors of towns of over fifty thousand people, etc. Spain has also a large number of elected "senators," representing the commercial and provincial states, the universities, etc. It is to be observed that even in cases where the hereditary seats are deliberately granted to the nobles under a modern constitution (as in Prussia, 1850, Spain, 1876), they really represent a continuation of the peculiar civil and political privileges (rights of local government, feudal dues, immunity from taxes, etc.) formerly enjoyed by the nobles, or a compensation for the loss of the same. The hereditary portion of the legislature is thus everywhere to be regarded only as a survival of the past. There are no hereditary members in the upper houses of France, Switzerland, the Netherlands, Denmark, Belgium, Norway, Sweden, Italy, excepting only, in the latter case, the princes of the royal family.

In many legislatures the seats in the upper house, or at any rate in a part of it, are neither held by a hereditary tenure nor filled by election. The members are appointed to their office, the nominations being made almost invariably by the executive government. Such a system, though at first sight repugnant to the idea of popular government, has a great deal in its favor. Experience has shown that the process of popular election does not always result in the selection of the ablest and most upright men of the country. Election is apt to favor the candidates who possess in a high degree the more popular arts, who have a readiness, or even a ready buffoonery in speech, who are not sensitive to political abuse, and who have a reputation (military, for example) calculated to appeal to the imagination of the crowd. It does not follow that these men, when elected, are the best suited for the legislative office. There are in every community many men of very great talent, conspicuous perhaps in science or literature, who would never be elected at the polls, who would probably hesitate to offer themselves as candidates, and who nevertheless are admirably fitted both by their intellect and their character for a seat in the legislature. The system of appointment renders it possible, in theory at least, for men of this class to be selected. This is the principle that is aimed at in the nominations to the senate of Italy, where the condition obtains that the person nominated must either have filled a high office, or have acquired fame in literature, science, or some other pursuit tending to the benefit of the nation. Many of the Continental legislatures, as already seen, admit of a partial construction of the upper house on this plan. The system of nomination is seen in its entirety in the senate of the kingdom of Italy and in the senate of the Dominion of Canada. In Italy all the senators, exclusive of the members of the royal family, are nominated for life by the king, and are selected out of the following classes, — bishops, high officials, members of the lower house after three terms of service, members of the Royal Academy of Science, those who pay six hundred dollars a year or more in taxes, and men who have benefited the nation in literature, art, etc. In Canada the senate is composed of members nominated for life by summons of the Governor General, the total number and the number from each province being limited. Experience has unfortunately shown that nominated senates are better in theory than in fact. The difficulty encountered in practice is that, whatever may be the nominal constitutional power of such a senate, it is in reality unable to act as a counterbalancing force to the house elected by the people. The senate of Italy is a feeble body, and can offer no real opposition to the Chamber of Deputies. In Canada also the parliamentary life and parliamentary power are centred in the House of Commons.

It remains to consider the system of election as applied to the composition of upper houses. This is the method used, either in direct or indirect form, in the United States, both in the federal and state governments, in Mexico, Cuba, and the other Latin American republics, in France, Belgium, and the commonwealth of Australia. The difficulty encountered here at the outset is the danger of making the upper house a mere reduplication of the lower, which would serve but little purpose, and might lead to a chronic constitutional deadlock. Various means are taken to overcome this difficulty. In the first place, in a federal government, especially since the example set by the United States in 1787, the problem may be said to solve itself: the upper house may be made especially representative of the units of the federation, the lower house may represent the people at large on a basis of population. Thus there are in the United States two senators for each state, in Cuba four senators for each; the senate of Brazil has three from each state, and the Australian senate is similarly composed. In the German federal government the constituent parts of the federation are represented in the Bundesrath, not exactly on a footing of equality, nor yet in proportion to population; even the smallest have one vote each, and Prussia, the largest, has only seventeen votes. In all these cases the representation in the lower house is according to population. This is an extremely useful device, as it renders a federation possible between units of different sizes, the smaller of which would be too jealous of the larger to enter a union on a basis of representation purely proportionate to numbers, while the larger states would be unwilling to accept a federation on terms of complete equality with the smaller ones.

A further method of distinguishing the two houses is found in varying the system of election and adopting a direct election for the lower house, and indirect for the upper. This is best seen in the case of France. The Chamber of Deputies is elected by direct universal suffrage from districts of (approximately) equal population. The election of the senate is indirect, and is made by an "electoral college," in each department of France, consisting of the deputies, councilors-general and district councilors (members of the councils for local government), and representatives from the municipal council of every commune: the latter class form a large majority of the total college. The original intention was to make the senate especially representative of the organic life of the commune, or parish, while the deputies should represent the nation at large. Indirect election is also used in the United States, where the United States senators are elected by the state legislatures. In the state governments the senators are elected by the people, the election district being, however, different from that used for elections to the Assembly. In addition to the difference in the manner of elections, a differentiation can be made by the use of different electoral districts for the two houses, as already indicated, by adopting terms of office of different length, and by the system of partial renewal. For example, a United States senator sits for six years, a member of the House of Representatives only for two; in France, while the deputies have a four years' term, a senator sits for nine years. Similarly in the United States, one third of the Senate is renewed every two years; in France and in the Netherlands, one third of the upper house is renewed every three years. This method of partial renewal is of particular efficacy and importance. It lends a character of permanency and stability to the upper house, which offsets the tendency of the lower one to a too complete change of membership and of sentiment as the result of a general election.

4. Distribution of Power between the Two Houses. So much for the question of the composition of the two houses; let us turn now to consider the relative degree of power to be intrusted to them. The usual practice is that the two houses are, in almost all matters of legislation, equal and cöordinate; either house may originate a bill, and no bill thus originated can become law without the consent of the other house. Either house, too, may propose amendments to a bill, which will only become valid by receiving the consent of the other. To this general rule there is one most notable exception. In the case of bills referring to the raising and spending of money, the powers of the upper house in most of the chief states of the world are more or less limited. For this different reasons are assigned, in part historical, in part rational. Historically we may consider this to have come about in imitation of the relation existing between the House of Lords and the Commons in England, where the power of the purse ever since the fourteenth century has been vested exclusively in the commons.[1] But it hardly seems correct to regard this almost universal restriction on the power of upper houses as merely an accidental adaptation. There seems excellent reason for it as well. In the case of most of the bills introduced in a legislature no great harm ensues if the proposals of one house are rejected by the other; matters merely remain where they were before. But in the matter of money bills the case is different: if no bill is passed for the raising and spending of money the public service will come to a full stop. It therefore seems wiser to make the wishes of one house more or less decisive in the matter; and of the two, the house more directly and proportionately representing the people appears to be the natural one to intrust with this power. The disability thus laid on the upper house in matters of finance varies in different legislatures. It is most complete in the case of the British House of Lords. This body, by the custom of the constitution, has no power to originate, amend, or reject a bill for the raising or spending of money. Other houses, as is the case with the House of Lords in Prussia, and the first chamber in the Netherlands, while forbidden to originate or amend money bills, are empowered to reject them *en bloc*. France offers a doubtful case; the senate is forbidden to originate measures of finance and has certainly power to reject them, but the question of its right to amend is a constitutional point not yet clearly settled.[2] The Senate of the United States represents a higher step in the ascending series of powers. "All bills for raising revenue," says the Constitution (art. i, § 7), "shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." In reality this amending power is used by the Senate with such latitude as to render the two houses in their legislative capacity what Mr. Bryce has called "really equal and coördinate." In a few cases, in the federal legislature of the German Empire and in Switzerland, the two houses are legally on a footing of equality in regard to money bills. In Austria an ingenious expedient is added for preventing the disagreement of the two houses from stopping the wheels of government. It is part of the fundamental law that if the two houses, even after consultation, can reach no agreement in regard to a financial measure, then the lower sum of money voted (by either house) is considered as granted.

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[1] Taswell-Langmead, *Constitutional History*, chap. viii.

[2] Lowell, *Government and Parties*; Simonet, *Traité Elémentaire du Droit Public*.

In all matters other than money bills it is usual that the two houses are on a footing of equality as far as the law of the constitution is concerned. But in practice it generally happens that the lower house is decidedly the "predominant partner;" in the case of a conflict between the two, public opinion is generally in favor of the house which more immediately stands for the vote of the people, and circumscribes to a large extent the resistance that can be offered by the upper house to the more popular body. This is the explanation of the relatively feeble power of the senates of France, Italy, and Canada. The cases of the German Bundesrath and the American Senate, which enjoy a power practically greater than that of the lower house, are quite exceptional. The Senate of the United States owes its extensive power partly to its federal character, by virtue of which it represents the states in their separate capacity, partly to the length of the senatorial term, and in part also to its historical antecedents, and the traditions of political weight and stability which it has acquired. The constitutional relations existing by the custom of the country between the Lords and Commons of the United Kingdom are quite unique. It is only to be expected that the House of Lords, no part of which is elected by the people either directly or indirectly, should be able to offer only a limited resistance to the Commons even in matters that are not financial. The constitutional relation of the two houses is thus stated by Mr. Dicey in his "Law of the Constitution:" "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought at some point (not definitely fixed) to give way; and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of its responsible advisers, to create, or threaten to create, enough new Peers to override the opposition of the House of Lords, and thus restore harmony between the two branches of the legislature." By the "confidence of the country" is meant the endorsation of the conduct of the Commons, or more correctly of the majority in the Commons, by the people voting in a general election on the issue involved. This constitutional relation is sometimes briefly stated by saying that the Lords have no right to oppose the Commons on the issue on which the Commons were elected. The precedent involved was established by the passage of the Reform Bill of 1832.

The Lords insisted on opposing the measure even though a dissolution of Parliament resulted in the election of a new House of Commons overwhelmingly in support of parliamentary reform. The written threat of the king (William IV) to create peers in favor of the bill, forced the Lords to withdraw their opposition. In accordance with this precedent the Lords have found themselves several times compelled to waive their legal right of resistance to the Commons. The bills for the repeal of the corn laws (1846) and for the disestablishment of the Irish Church (1869) are cases in point. That the precedent has not altogether shattered the constitutional power of the Lords is seen in their rejection of Mr. Gladstone's Home Rule Bill (1893). In spite of the fact that they were opposing a House of Commons elected directly on the question of home rule, the Lords threw out the bill; it was argued in support of their action that though the electorate had spoken in favor of home rule, they had not indorsed this particular bill, which had not yet been made public at the time of the election. A further argument was found in the fact that the bill had been forced through the Commons by means of the closure, which had perhaps unduly abbreviated debate.

Whatever arrangements may exist, either legal or customary, there always remains in the background the danger of conflict or even of an actual deadlock between the two houses. In most legislatures, as for instance in the Congress of the United States and in the Parliament of the United Kingdom, this danger is lessened by the system of conferences between representatives of each house. In the Congress, when the houses are unable to agree over amendments, three members of the Senate are appointed to confer with three members of the House of Representatives, with a view to arranging a compromise. Although serious differences of opinion have often existed between the two houses of Congress, the possibility of an actual deadlock bringing the legislative machinery to a standstill is not one of the special dangers in the American system. Beyond the plan of committees of conference there is no legal machinery for forcing an agreement between the two houses. The case is quite different with the newly made constitution of the commonwealth of Australia. Australian legislatures, especially the legislatures of Victoria, have experienced the very serious dangers that may be threatened by the obstinate disagreement of the upper and lower house.[1] As a result of the difficulties that have thus arisen, the new constitution of the commonwealth contains in consequence provisions that are intended to render impossible a complete deadlock in the federal legislature. The Governor General is empowered in the event of the House presenting and re-presenting a bill, and the Senate persistently rejecting it, to dissolve both houses simultaneously. If after a new election the same situation persists, the governor may convene a joint sitting, the vote in which is final.[2]

5. Direct Legislation; the Initiative and the Referendum. As a conclusion to our discussion of the legislature and the legislative process, we may briefly advert to what is called direct legislation, or the making of laws by means of the action of the people themselves. That the whole of the people, or at any rate of the voters, should participate in the process of legislation seems in a sense the embodiment of the idea of democratic self-government. Rousseau regarded it as the only true expression of popular sovereignty. In some form or other it has been known since the earliest historical times. At Athens there existed the *Ecclesia*, an assembly of all the free citizens, erected by Solon in the sixth century B. C. into an organ of general political control. In it the citizens decided on questions of peace and war, and voted on matters laid before them by the Council of Four Hundred. The Romans also had their *Comitia Tributa*, or meeting of the people by tribes, which became in the latter days of the republic a lawmaking assembly. In the smaller cantons of Switzerland the *Landesgemeinde*, or gathering of the people, has acted from time immemorial as a legislative body. Such organs of government were rendered possible in the city states of the classical world, and in the cantons of Switzerland, by reason of their restricted territorial extent. In the larger states of the world an actual gathering of the people is a physical impossibility. The sovereignty of the people has worked itself out by means of representative assemblies. But at the present day the growth of rapid communication by post and telegraph renders it possible to have recourse to some extent to the whole body of the citizens in the making of the law; the people of a great state cannot, it is true, be all gathered together in one place in a deliberative capacity, but it is possible for them all at one and the same time to give their vote upon any measure proposed. The system of direct legislation which is thus rendered possible has been favored by the growing distrust of representative legislatures which is noticed in so many democratic countries at the present day. There is an increasing tendency to rely on the general will of the whole people as expressed in a direct vote. "The people," says Professor Goldwin Smith, "cannot be lobbied, wheedled, or bulldozed; the people is not in fear of its reëlection if it throws out something supported by the Irish, the Prohibitionist, or the Methodist vote." As against this contention it may properly be advanced that the making of laws requires, like every other task of importance, a special training and experience, and that the interests of the people are really safer in the hands of carefully chosen legislatures than when submitted to the hazards of a popular vote. The fact that in every community a large proportion of the citizens are of necessity too much absorbed in their own affairs to be able to properly consider the public questions submitted to them, is also of considerable weight. Rightly or wrongly, however, legislation by the people is already used to a considerable extent. It assumes several forms. Of these the most important is the referendum, or submission to the popular vote of a proposed measure or constitutional change which becomes law if ratified by the required majority. The initiative means the legal right of the people, acting by petition and in sufficient number, to cause a legislative measure to be brought to a popular vote. There is finally what may best be called the plebiscite, or vote of the people used merely as an expression of opinion without binding force, and intended as a guide to the policy of the government. It is in Switzerland more than anywhere else that direct legislation is in use. Of the nineteen cantons and six half-cantons which form the federation, two cantons and four half-cantons still preserve the immemorial Landesgemeinde, or mass meeting, already referred to. In Uri, for example (of which the total population is 19,700), the people meet once a year in a large meadow, where they vote taxes, pass laws, and elect their executive officers for the coming year. Even in the cantons which have representative legislatures the referendum — the submission of the laws to the vote of the people — is largely used. In about half of them it is "optional," employed, that is to say, only when called for by petition. In all the rest (except Freiburg) it is "obligatory," and must be used for all legislative measures of importance. In all the cantons changes in the constitution can only be made if ratified by the popular vote. The initiative, or right of the people to introduce laws by petition, is of more modern creation, having been first introduced into the constitutions of the cantons in the middle of the nineteenth century. It is permissible at present in all but three of the cantons for ordinary measures of law, and in all but one for constitutional changes. In the federal government of Switzerland the referendum is compulsory for an amendment of the constitution. There is also an optional referendum, requiring the submission of ordinary laws to the people if called for by thirty thousand citizens or eight cantons. The initiative in the shape of a proposal supported by fifty thousand voters also exists in the federal government; though nominally admissible only on constitutional amendments it can in practice be applied to any measure by giving it the form of a change in the constitution. That this system thus established is of great practical importance in the government of Switzerland is seen from the fact that between April, 1874, and October, 1896, no less than thirty-eight popular votes were taken. Unfortunately it is impossible to draw any general conclusion as to the utility of direct legislation from the experience of Switzerland, as its critics, both in and out of that country, are much divided in opinion.[1]

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[1] For an account of the experience of Victoria in this connection, and the political crisis of 1877, see Edward Jenks, *Government of Victoria*, part iv, chap. xxxiii.

[2] Commonwealth Act, § 57.

In the United States, direct legislation, though not always referred to by that name, exists to a considerable extent. There is in the first place a historic form of it in the shape of the New England "town meeting," or assembly of the electors of the township. This is almost a counterpart of the Landesgemeinde of Switzerland. The voters come together in a mass meeting once a year (and on special occasions if called for by petition) and not only elect the "select men" or officers of the township, but also vote on the raising of taxes, the spending of money, and on other local questions. The town meeting is an instance of direct legislation of the purest type, inasmuch as it permits of discussion as well as voting in the mass meeting.[2] Another form of direct legislation is seen in the ratification by the people of changes in the Constitution, a system now practically universal in the United States.

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[1] The most complete authority on the subject is Deploige, *The Referendum in Switzerland*.

[2] For details as to the New England town meeting past and present see Fiske, *Civil Government in the United States*, chap. ii.

The constitutions of many of the states make a still further use of the principle. As has already been seen, the power of the state legislature is often restricted by a constitutional provision requiring certain kinds of statutes to be submitted to a popular vote. The constitution of Pennsylvania (1873), for example, declares that "no law changing the location of the capital of the State shall be valid until the same be submitted to the qualified electors of the commonwealth at a general election, and ratified and approved by them."[1] Similar provisions in regard to altering the location of the capital are found in the constitution of many other states. In the same way a clause of the Iowa constitution of 1846 (adopted later in the constitutions of New York, California, Illinois, and a number of western states) provides that laws for the contraction of debt (with certain exceptions) must be submitted to the people. In many states, too, the raising of taxes beyond a stipulated limit can only be effected by means of a popular vote. Of other matters treated in this way the alienation of public property, the creation of banks, and the extension of the franchise to women may be cited. The popular votes by which female suffrage was rejected in South Dakota (1898), in Washington (1898), and in Oregon (1900) were of this nature. Direct legislation is also found in the form of a "municipal referendum" in which the people of a county or town vote on the question of the location of the county seat, the contraction of a local debt, or the adoption of a city charter. The system is decidedly growing in favor, especially in the western part of the Union, and profits by the distrust with which the state legislatures are often viewed by the people at large. The Populist party in its national convention at St. Louis, in 1896, expressed itself in favor of the use of both initiative and referendum; the same demand was repeated in the platforms of both sections of the party in 1900, and at the Springfield convention of the party in 1904. Present indications seem to show that direct legislation is destined to play a considerable part in the American system of government.

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[1] Constitution, art. iii, § 28.

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CHAPTER III

THE EXECUTIVE

1. Concentration of Authority the first Requisite of the Executive. — 2. Methods of Appointment; Hereditary Executives. — 3. Elective Executives. — 4. Presidential and Parliamentary Government. — 5. Subordinate Officials of the Executive; the Civil Service.

1. Concentration of Authority the First Requisite of the Executive. The term executive is used to designate those officers of the government whose business it is to "execute" or carry out the law of the land. In the narrower sense it often signifies merely the supreme head of the administration, as the President of the United States, or the same person together with his chief subordinates. Thus when we speak of the "executive" of the French Republic, we refer to the president, or perhaps to the president together with the prime minister and cabinet. But the word has also a wider signification, in which it means the entire staff of officials, high and low, who are concerned with the administration of public affairs. This does not, of course, include persons acting in a legislative or judicial capacity, but comprises all such public servants as postmasters, revenue officers, sheriffs, inspectors, commissioners, etc. Occasionally even the army and the navy are included in this usage of the term. In the following chapter the word executive will be used in the narrower sense except where otherwise indicated.

The first striking point to be noticed in connection with the executive heads of modern governments is that, while members of the legislature are many, the chief officers of the executive are few. This, as has been seen, arises from the fact that the prime need in the executive or acting branch of a government is promptness of decision and singleness of purpose. That this is difficult to obtain among a number of persons acting with equal authority goes without saying. "One bad general," the Emperor Napoleon once said, "is better than two good ones."

It is further to be noted that to a very great extent executive authority — either over the whole conduct of government or over its subdivisions — tends to centre in a single person. Thus in the United States the supreme administration lies in the President, whose chief subordinates are his own creations, and can be dismissed by him. In Great Britain the virtual control of affairs is in the hands of a cabinet of fifteen to twenty persons, one of whom is, to a large extent, dominant over the others. It is not necessary that any single person should always impose his own ideas and his own will upon the conduct of public administration. But it is essential that there should be some one person who can in the last resort exercise a decisive and final authority. It is one of the admirable points in the federal Constitution of the United States that, by virtue of his position of commander-in-chief of the army and navy, the President may become in time of war almost a dictator. His power expands with the need of strengthening the executive, and he is able to cut the Gordian knot of legislative perplexities by the incisive application of a single will.[1]

It appears, then, that there is a strong presumption against what is called a "plural executive," or group of persons exercising the supreme executive authority, no one of whom is superior in power to the others. Such a body is able to act only by joint decision. At first sight there appears a decided gain in this system in the direction of maturity of judgment and mutual control of the members against any possible tyranny on the part of any of them. But the necessary loss in promptness of resolution and the danger of actual conflict of opinion in a moment of crisis, more than offsets this gain. As a matter of fact a plural executive is scarcely able to act at all except by subdividing the work to be done and committing certain special functions to the care of each of its members. This was, for example, the plan pursued by the Committee of Public Safety, the joint executive of eleven members which governed France during the reign of terror, 1793–94.[2] History offers many examples of plural executives, such as the dual kings at Sparta and the consuls at Rome. But experience has been decidedly unfavorable to such a plan of government. To this general verdict a signal exception is found in the case of modern Switzerland. Here the supreme executive power is vested in a board of seven persons, the Bundesrath, or federal council, elected for a term of three years, by the two houses of the legislature in joint session. Although one of the council is nominated each year to the titular dignity of president of the Swiss Confederation, he is in no sense above the others in authority. The members act severally as the heads of the seven governmental departments, though this is for convenience only, and not prescribed by the constitution. In their corporate capacity they manage the general conduct of the administration. In practice the system works admirably. The members of the council are constantly reëlected, and enjoy what is practically a permanent tenure. But this rather anomalous situation is partly to be explained by the fact that the legislature itself decides upon the policy to be pursued in all matters of moment.

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[1] Consult in this respect J. W. Burgess, *Political Science and Constitutional Law*, vol. ii, division iii, chap. iv.

[2] For the division of executive business among the members of the Committee of Public Safety, see Morse Stephens, *The French Revolution*, vol. ii.

2. Methods of Appointment; Hereditary Executives. Returning, then, to the consideration of modern executives in general, and having noted the prevailing principle of single control, we may next indicate the great differences that exist in the method of selecting the executive heads of governments, in their tenure of office, and in the relations of the executive to the legislative body. Two separate lines of classification are here presented; first the distinction between hereditary and appointed executives, and secondly the distinction between those that are real and those that are nominal. A hereditary executive — a king, emperor, sovereign prince, etc. — enjoys a tenure which is not only lifelong, but which passes to his heirs. Such an institution has of course no place among the political ideas current in the independent states of the American continent. Looked at in a purely rational light, it is difficult to find much to be said in its favor.

A hereditary ruler seems on the face of things as absurd as the hereditary mathematician or hereditary poet-laureate referred to in the preceding chapter. But hereditary monarchy, as it exists in Europe, is not to be disposed of in so simple a manner. In nearly all countries where it exists, it is a historical product, and has grown up as a part of the political evolution of the state. In many cases, too, it is regarded by the people of the country, as most notably in Great Britain, not only with tolerance, but with the most sincere approval. The desire for a republican form of government is about as little known in England as the desire for a monarchical system in the United States. But the real secret of the persistent survival of hereditary monarchy in so many of the civilized communities of the world lies in the fact that, in the cases where it meets with the greatest approval, the hereditary sovereign is a nominal and not a real executive.[1] In the United Kingdom, Italy, Hungary, Belgium, etc., the actual conduct of government is not in the hands of the king. The king is, to a great extent, though of course not literally, only the nominal head of the state; public business is transacted in his name, and professedly by his authority, but in reality the control of affairs is in the hands of the prime minister and cabinet, who represent the voice of the people. In this form the system can be supported by many arguments of great weight. It helps to lend to the government of the country those features of stability, permanence, and continuity which are among the most essential factors in political institutions. To international dealings it contributes, whether rightly or wrongly, a certain prestige that is not without its diplomatic value. It is certainly, also, to be admitted that the traditions which surround a monarchy of long continuance help to inspire the actual chiefs of the government with a sense of responsibility and dignity most salutary in its effect.

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[1] A very interesting discussion of the somewhat accidental development of the peculiar position held by a "constitutional" sovereign is found in Sidney Low's *Governance of England.*

In spite of all this it may perhaps be doubted whether the wonders of constitutional monarchy have not been somewhat overestimated by its English panegyrists. When all is said and done there always remains a contingent possibility that a future monarch may break rudely away from the self-effacement imposed upon him by the system. The admirable manner in which Queen Victoria and Edward VII have filled the position of constitutional sovereign has made people forget that this self-effacement is customary, and not part of the law of the land. The relations thus established, especially in the connection of the sovereign with foreign affairs, are extemely delicate, and demand for their proper maintenance a high degree of tact on the part of the monarch. The successful operation of system is by no means so independent of the competence or incompetence, the integrity or perversity of the reigning prince as the English writers are inclined to imply. Whether or not such contingent disadvantages overbalance the features of stability and continuity that result from the institution of monarchy is of course a subject admitting a great diversity of opinion.

The hereditary monarchs of the present day are not all of the constitutional type. The king of Prussia (who by virtue of his kingship is also German emperor) is an example to the contrary. Here the constitutional maxim that the king "reigns but does not govern" no longer holds true. The king of Prussia not only reigns but governs also,[1] and his executive function is both titular and actual. The kingship passes to his descendants. To the American mind it seems very difficult to defend such an institution. The defense on grounds of dynastic rights to the kingship as a sort of property, or on quasi-theological grounds as a thing specially instituted by the deity, hardly needs refutation. Any defense of such a monarchy on the grounds of its efficiency carries with it the assumption that the future sovereign in line of descent will of necessity prove efficient. Nevertheless, German writers on public law are quite prepared to defend the existence of monarchy even where not of the limited or constitutional type.

3. Elective Executives. In contrast to hereditary executives may be placed the wide class of those that may best be termed elective. The terminology is here hardly satisfactory, for in addition to officials actually elected, such as the President of the United States, there exists a class of head executive officers who are certainly not hereditary, and who are rather to be thought of as selected than elected. The word "nominated," or appointed, would indicate more precisely the method of their accession to office. Inasmuch, however, as such chief executives are found not in independent states, but in the subordinate governments of an imperial system, it would seem improper to make on their account a third general category of the executive in general. Such officials as the Governor General of Canada, the Viceroy of India, and the governors of British colonies, all of whom are nominated by the crown, are of this description. The lieutenant-governors of the Canadian provinces, who are appointed by the Governor General, belong to the same class. These executive officers will also be divided into those that are actual and those that are only nominal. The Viceroy of India is of the first sort; the Canadian Governor General is of the second, and the lieutenant-governors represent only the thinnest kind of nominal power. Such executives are of course merely the outcome of the peculiar circumstances of the British empire, in which it is necessary to reproduce by proxy in the colonies and dependencies the nominal character of the power of the British sovereign.

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[1] "With us the king himself governs; the ministers of course formulate (*redigiren*) what the king has commanded, but they do not govern." Speech of Prince Bismarck in the German Reichstag, 1882.

Most independent states that are not under a hereditary monarch have at their head an elected executive chief. Between these two an intermediate form might be distinguished, a king elected for life out of a "reigning family." This form is often found in history, as for example in England at the time of the Norman conquest. It belongs to an age when the king was in the full sense of the term the "war lord," and when military prowess was so important in a ruler that the reign of a minor or a weakling was repugnant to the general sentiment of the nation. But among the elected executives of modern civilized states such a form no longer appears.

The actual elected executives present a considerable diversity. They are almost all alike in that the supreme power, nominal or virtual, is vested in a single person, though even here the Swiss executive has been seen to be an exception. But apart from this many divergencies appear. In the first place the manner of election is various. The President of the United States is elected by an indirect election, which through the purely mechanical nature of the electoral college has become practically direct. In France the president is elected by the two houses of the legislature sitting together as a "national assembly." The governors of the separate commonwealths of the United States are elected directly by the people. The system of election varies among the republics of Central America and Southern America. Some of them, as Mexico, the Argentine Republic, and Chili, choose their presidents by indirect election. In others, as for example, in Peru, in Brazil, and in Bolivia, the election is made directly by the people. Theoretically considered, the process of indirect election appears attractive. While not inconsistent with the principle of popular sovereignty, it appears to put the actual choice of the executive head into the hands of a specially competent body. Practical experience, however, is against the plan; it is found either to convert itself into what is merely a needlessly cumbrous form of direct election, or else to lend itself to the intrigue and sinister influence of an inside ring.

Another difficult problem presents itself in the matter of the duration of the executive term of office and in the question of reëligibility. In all democratic republican countries there is an instinctive repugnance to long continuance in office, and a fear that an office thus held may transform itself into what is practically a monarchical tenure. In accordance with this idea the presidents of the different American republics hold office for terms varying from four to six years. For the same reason the outgoing president is in most of these cases not eligible for the succeeding term. Mexico, in which the president is not only reëligible after his four years in office, but has in fact been continuously in office from 1884 until 1906, is here an exception. In the United States the law of the Constitution does not prohibit reëlection. But public opinion has confirmed the precedent first set by Washington, and forbids the election of the President for a third term. That such a rule was a salutary precaution at the inception of the republic was doubtless true. At the close of the eighteenth century, a republic covering any considerable territorial extent was regarded as an experimental departure in political institutions.[1] It was consequently well worth while to make special sacrifices to avert the possibility of the subversion of republican institutions by the too great dominance of a single person. The example of Napoleon Bonaparte, who found means to convert his consulship for ten years into a consulship for life, and then into an imperial rule, illustrates the danger which Washington and his immediate successors were anxious to avoid. But it may well be doubted whether at the present time, and in a country in which republican institutions have been consolidated by a hundred years of political growth, such a customary regulation has not become an anachronism. It deprives the country of the services of its greatest political leader at the very time when his matured experience has especially fitted him for his post. Certainly in England such a compulsory retirement of men like Gladstone, Beaconsfield, and Salisbury at the very zenith of their political career would be considered a national loss. In France the president is elected for seven years and is reëligible; but it must be remembered that in this instance the president is not the governing executive but only the nominal head of the state. The French republic is a parliamentary republic, and the executive power is in reality held by the prime minister and his cabinet.

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[1] Montesquieu (*Esprit des Lois,* 1748, bk. viii, chap. xvi) says: "Il est de la nature d'une république qu'elle n'ait qu'un petit territoire: sans cela elle ne peut guère subsister." The reflections which follow on the political dangers of a large republic are especially interesting. See also Rousseau's *Social Contract.*

4. Presidential and Parliamentary Government. From what has been said it will be seen that the divisions of executive into hereditary and elective, nominal and actual, lie crosswise of each other. A hereditary sovereign may be nominal, as in the case of the British king, or he may be an actual ruler, as is the king of Prussia. Similarly an elected executive such as the President of the United States is actual, while the president of the French Republic is only nominal. The distinction between nominal and virtual executives leads to the consideration of the most fundamental of all questions in regard to the executive, namely, its connection with the legislature. This has already been referred to in discussing the separation of powers, but some further treatment is here necessary. The governments of modern states are divided between two rival systems of operation. Of these the one is commonly termed "parliamentary," "responsible," or "cabinet" government; the other, for which no satisfactory designation can be found, has been variously styled "non-responsible," "presidential," or "congressional" government. In a parliamentary government the tenure of office of the virtual executive is dependent on the will of the legislature; in a presidential government the tenure of office of the executive is independent of the will of the legislature. Parliamentary government is always found in connection with the presence of a nominal executive. But it is to be remembered that this nominal executive need not be a hereditary titular sovereign. In France the government is parliamentary, but the nominal head of the state is an elected officer. Similarly the presidential system is always found in connection with a real or virtual executive; but this real executive need not be an elected president, as the instance of Prussia clearly shows. It thus seems that the word presidential is somewhat a misnomer, since a presidential government may not have a president, and a country which has a president need not have a presidential government. Unfortunately, however, no more adequate terminology can be found; "non-responsible" carries with it an entirely false connotation, and "congressional" has already another signification in allusion to the Congress of the United States.

The principle of parliamentary government is best understood by studying the evolution and operation of the British cabinet. The king of England was never without a group of councilors and chief officers to aid him in the conduct of the government. These advisers, known in Norman times as the King's Ordinary or Permanent Council, and from the time of Henry VI as the Privy Council, were men of the king's own choice. They were the king's "ministers" in the literal sense of the term. Nor were they, for centuries after the consolidation of consultative assemblies into a national Parliament (1295), controlled by the legislature, except by the heroic remedy of impeachment. They were rather the natural antagonists of the Parliament than its chosen representatives. This is particularly seen during the tyranny of the Stuarts, where Sir Thomas Wentworth's desertion of the popular cause elevated him to the position of a minister of the crown. Moreover, the group of ministers who formed the king's council constantly showed a tendency to unduly increase in numbers. This led to the concentration of power in the hands of an inner circle, to whom the name "cabinet" came to be applied. The overthrow of the Stuarts and the recognition of the principle of the supremacy of Parliament by the Bill of Rights (and later by the Act of Settlement) rendered the previous relation of ministers and Parliament no longer possible. As a means of conducting the executive government with the support of the members of Parliament, William III, acting on the advice of the Earl of Sunderland, deliberately chose his ministers from the ranks of the party dominant in the Commons. This, if ever one may speak with propriety of a political invention, was the invention of the cabinet system of government. Yet the system thus instituted remained for nearly a century in a rudimentary and imperfect state. The ministers did not at first feel called upon to resign on the loss of parliamentary support. They prefered to wait, as did William's ministry in 1698, for the adverse majority to "blow over." Nor did the ministry throughout the first half of the eighteenth century resign or enter office as a body. Lord Rockingham's cabinet of 1765 may be looked upon as the first set of ministers coming into office as a body. Even till the end of the century the ministers, though they might belong to the same party, were not of necessity united in policy or harmonious in their political relations with one another. Pitt's insistence on the resignation of his refractory chancellor Lord Thurlow (1792) marks the recognition of this stage of cabinet evolution; the refusal of the ministers of George IV to give him individual advice in reference to a matter of foreign policy indicates its final adoption.[1]

Taking the cabinet as it now exists, it may be said to operate on the following plan: It consists of a group of from fifteen to twenty men, who, though not legally a corporate unit, have in practice a united policy and a united responsibility. Each of them is a member of the legislature, either of the Lords or of the Commons. They are nominated by the crown, acting on the advice of one of their number whom the king has first selected to be the prime minister. They belong to the political party or coalition of parties which commands the support of the House of Commons. Should they lose that support they resign collectively. In the

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[1] The development of cabinet government in Great Britain is traced in Hearn, *Government of England.* See also C. Ransome, *Rise of Constitutional Government.*

United Kingdom the whole of this arrangement is customary, and not legal. But such need not be the case. In France, for example, it is part of the law of the constitution[1] that "the ministers are collectively responsible to the chambers for the general policy of the government." This is held to mean that they must resign if no longer supported by the Chamber of Deputies.[2]

To this relation thus existing between the French or British executive and legislature, the presidential system as seen in the United States or Germany stands in complete contrast. In the United States, for instance, the President, who is the actual executive, is elected independently of the legislature, for a term of years prescribed by the Constitution. Except by the process of impeachment, the legislature cannot shorten his term in office. Nor can the legislature dictate to the President the political or administrative policy to be followed, nor control it in any direct legal way, excepting in so far as the Senate has a veto upon the making of appointments and treaties. Moreover, the members of the President's "cabinet," as the group of executive officers who are at the head of the different departments is commonly called, are appointed by the President himself. There is no obligation upon him to consult the wishes of the legislature in selecting them. Nor can the legislature, except in the last resort, by impeachment, force the dismissal of members of the cabinet. The President, on the other hand, can appoint and dismiss them at will. Similarly in Germany, the emperor has an actual executive power. His official acts, indeed, require the countersignature of his chancellor, but the latter is an officer of his own creation, holding office during the emperor's pleasure.[1] There is no power on the part of the legislature, by an adverse vote or otherwise, to force the resignation of the chancellor. The same relation is found in the government of the kingdom of Prussia.

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[1] *Loi Constitutionelle*, Feb. 25, 1875, art. 6.

[2] The extent of the power of the French Senate to force a ministry out of office is a doubtful constitutional point. Dupriez, *Les Ministres dans les Principaux Pays d'Europe*, vol. ii.

The above illustrations show what different purposes parliamentary and presidential government may be made to serve. In Prussia presidential government permits of the existence of a national legislature, the lower house of which is democratic, without putting an end to the dominant power of the crown. In Great Britain parliamentary government has afforded a means of compromise whereby the monarch retains his nominal position as the controlling authority, while in reality the centre of power has been shifted to the elected representatives of the people. In France and the United States, on the other hand, the parliamentary and the presidential systems have been each deliberately adopted as the best means of putting into practice the doctrine of popular sovereignty.

It is impossible here to institute a detailed criticism of the merits of the two systems. In England the parliamentary system plays a specially useful part in enabling the government to be converted into a democracy without breaking with the historical position of the crown. The same purpose has been effected by imitation in Italy, Spain, and other countries. The king of Sardinia was accepted as ruler by the other states which were joined into a united Italy (1859–70) by virtue of the fact that the governing power would lie with the representatives of the nation at large. If the gradual abolition of monarchy is to be part of the political evolution of the future, it will prove to have been effected by means of the parliamentary system. In spite of all that has been said in its favor, the system is not without its drawbacks. It works evenly and well where two great political parties exist, which alternately hold the power of government and of which each is gradually forced to give place to the other. But where not one but many parties exist (as in France and Italy at the present day), loose in cohesion, and constantly forming and reforming into new coalitions, it introduces a dangerous element of instability into national government, and leads to the sacrifice of principle for the sake of power. On the other hand the presidential system has very decided disadvantages. The office of chief executive becomes of so great importance that the recurrent election of the president occasions periods of great excitement and upheaval, always unfavorable to industrial activity and in turbulent countries fraught with possibilities of revolution. Moreover, apart from the artificial junction effected by party ties, the system may place the executive and the legislature in dangerous antagonism.

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[1] The immediate assistants of the imperial chancellor at the head of the different departments are not his colleagues, but his subordinates in the strict sense of the term.

5. Subordinate Officials of the Executive; the Civil Service. It has been said at the opening of the chapter that the term executive signifies sometimes the single head of the state, sometimes the head of the state together with his chief associates or subordinates, and at times the entire force of executive officers, high and low. The subdivisions of the executive government and the relations of its parts among themselves must consequently be separately considered. A distinction may here be at once made between executive bodies that are of the nature of a hierarchy, radiating from a common source, and those that may be spoken of as coördinate. In a purely hierarchical executive the whole staff of executive officers are appointed either directly or indirectly by the chief executive. Of this type is the government of the United Kingdom, in which appointments flow from the crown, and the federal government of the United States, whose officers are appointed either directly by the President or indirectly by a person or persons nominated by the President. The same is true in general of the executive officers of most independent states. On the other hand the commonwealths of the American Union have coordinate executives. Here the appointing power of the chief officer of the government (the state governor) is very limited; the majority of executive officers are elected to their positions by the people. This is true even of the chief officials associated with the governor, — the lieutenant-governor, the secretary of state, the treasurer, the attorney-general, superintendent of education, auditor, comptroller, etc. But a body of this sort is still properly to be regarded as a unit and not as a plural executive, since the whole staff of officials is under the supervision and to some extent under the control (sometimes by power of dismissal) of the executive head of the government. Moreover, the departmental heads each exercise a single and not a collective authority. The contrast between a coördinate executive and a hierarchical is extreme. The former works well enough in the subordinate governments of a federal system; in these, especially where there is an elaborate written constitution, executive duties are precise and there is but little latitude for general policy. But in a national government the case is different; here there is need for a central power of great authority, exercising a large amount of administrative discretion and able to rely on the vigorous coöperation of harmonious subordinates. The unity of purpose required to meet a sudden and serious national emergency could hardly be found in a cabinet of executive officers elected singly and separately by the people.

In all governments, even though there may exist one person of supreme executive power, it is necessary to divide up the practical conduct of the administration into a number of departments. The division adopted in four of the leading governments of the world is shown in illustrative form in the table at the end of the present chapter. It will be seen that certain great departments of business — the management of foreign affairs, of the army, of the navy, and of the finances — are common to all. The American Secretary of State corresponds roughly to what is elsewhere called the Secretary or Minister of Foreign Affairs. The names of most of the remaining cabinet officers indicate approximately the functions to be performed. In addition to the usual officers, each country finds it necessary to establish certain special departments to correspond to its peculiar needs. The office of the British Colonial

Secretary and that of the Secretary for India are examples of this. In "parliamentary" governments, too, it is found useful to include in the cabinet group several officers who have either no departmental duties or duties of only a nominal character, and are thus free to aid in the general political control. In Great Britain this is effected by means of sinecure offices almost free from actual administrative duties, such as the positions of the First Lord of the Treasury (generally held by the Premier), the Lord Privy Seal, the Chancellor of the Duchy of Lancaster, etc. In Italy, Canada, and other places, the practice is adopted of admitting to the cabinet ministers "without portfolio."

Below these heads of departments comes the general body of executive officers that form what is called the civil service. The relation of the members of the civil service to the heads of the government, their appointment, dismissal, and tenure of office, is one of the difficult problems of present politics. It will be well, therefore, briefly to indicate the existing status and regulation of the civil service in Great Britain and the United States. The case of Great Britain may best be discussed first.

The British civil service comprises a staff of about 80,000 officials. This includes the officers of the royal household, a large number of officials connected with the foreign, home, and colonial offices, the admiralty, the treasury, etc., officials serving under the local government board, the patent office, the emigration office, the diplomatic and consular corps, collectors of customs and excise, postmasters, etc. The fundamental principle in the conduct of the service thus constituted is permanence in office, and the dissociation of tenure of office from the changes of government caused by the cabinet system. The only officers of a political complexion are the heads of the departments, together with certain chief secretaries and assistants who are known collectively as the ministry, and who number in all about fifty persons. Thus, for example, the Home Secretary (principal secretary of state for home affairs) has as his subordinate a "parliamentary under-secretary," who, like himself, is a member of the ministry, and resigns office on the defeat of the government. He has also a "permanent under-secretary," who is not a political officer, and who is at the head of the standing staff of clerks, superintendents, inspectors, and other officials of the department. A similar plan, though the official titles vary, is in use in the Foreign Office, Colonial Office, India Office, War Office, the Admiralty, the Treasury, the Board of Trade, the Local Government Board, and the Post Office. The permanent tenure of office contributes greatly to the efficiency and integrity of the British civil service. Its origin is to be traced to the fact that in earlier times public office in England was a species of real property held by the incumbent for life or in fee. There still exist in the British civil service a few offices which are held, like the judicial positions, for life or good conduct. In the case of the great majority of official positions in the civil service the crown retains the right of dismissal. This right is exercised, however, only in cases of incompetence or dereliction of duty, and never for political reasons or to make room for a necessitous office-seeker. For entry into the service use is made, in most of the British departments, of the principle of open competition.

In the United States the method of appointment and dismissal in the executive branch of the federal government has proved a matter of serious national concern. A very few of its officers hold their posts, as do the federal judiciary, on a life tenure. Some offices, as, for example, the cabinet positions, are held during the pleasure of the President. But in the case of the great majority of positions, the appointment is made for a stated term of years, usually four. In the actual operation of the government, the difficulty centres around the questions of dismissal from office and reappointment at the expiration of the statutory term. It is clearly to be desired that competent officials should be left undisturbed in their positions, whatever be their political opinions. Particularly is this the case with such positions as those in the customs service, the postal service, etc., where the duties to be performed are of a more or less routine nature, and cannot be said to depend for their proper performance on harmony of political opinion between the head of the department and his subordinates. On the other hand, there is always the fear that the too great certainty of continuance in office may lead to official stagnation and a perfunctory discharge of duty. The federal Constitution is not explicit on the subject of dismissal from office. The extent of the right of dismissal is reached by inference from the constitutional provisions in regard to appointment, and from the obvious exigencies of the case. The power of appointment in the case of ambassadors, other public ministers and consuls, and judges of the Supreme Court, lies with the President, subject to ratification by the Senate; but "the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, or in the courts of law, or in the heads of departments."[1] Following the decision of the courts, the power of dismissal is incident to the power of appointment. Congress, it is true, during its conflict with President Johnson, undertook to limit the executive power of removal by passing the Tenure of Office acts (1867 and 1869), which called for the Senate's ratification of removal. The repeal of these acts (1887) put the matter on the same constitutional footing as before.

During the first thirty years of the history of the Union the power of dismissal was not used as a means of finding positions for party adherents. Nearly all the federal officials held office during the pleasure of the executive, and dismissal, except for cause, was not contemplated. Madison spoke of it as unconstitutional. The act of 1820, prescribing a four years' term of office (still subject to removal at will) for collectors of customs and many other federal officers, offered a starting-point for a new system. With the advent of President Jackson (1829) was inaugurated the "spoils system." Wholesale removals from office were made,[2] and the places thus made vacant became the prizes of the President's political followers. This disastrous precedent thus established was followed by later administrations, until the "clean sweep" of offices became a recurrent feature of American politics. Not the worst feature of the system has been the frequent incompetence of the persons appointed for political reasons to the vacant offices.

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[1] Constitution, art. ii, § 2.

[2] In the first twelve months of his presidency, Jackson made 734 removals from federal offices.

The obvious injustice of the "spoils system" and the inefficiency thereby occasioned in the public service led to a movement in favor of civil service reform, which culminated in the Civil Service Act of 1883. The purpose of this act is to separate as far as possible the civil service from politics, and to introduce the system of appointments by merit based on competitive examinations. The act establishes a body of three commissioners whose duty it is, at the request of the President, to aid him in drawing up rules directed towards the following objects that open competitive examinations shall be held in all branches of the civil service when classified for the purpose, and that appointments to office shall be made from those applicants graded highest; that appointments at Washington shall be apportioned among the states according to population; that no person in the public service shall be under obligation to contribute to any political fund, nor shall any person in the public service use his authority to coerce the political action of any other person. The act does not call for the classification of persons appointed by the President and ratified by the Senate, nor of those employed merely as laborers. There are also a large number of positions which are, for various reasons, excepted from the rules; the fourth-class postmasters, who number nearly 65,000, being of this class. Of the 310,000 posts in the executive civil service, over one half are now subject to competitive examination. It is evident that where new appointments can be made only on a basis of certified fitness, the tendency to deliberately create vacancies will diminish, and competent officials will invariably be retained in office. Not the least merit of the Civil Service Act is that it helps to educate opinion. It is only by the growth of a vigorous public feeling in condemnation of the spoils system that the evil can be eradicated.

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COMPARATIVE VIEW OF EXECUTIVE DEPARTMENTS.

THE UNITED STATES.	THE UNITED KINGDOM.	FRANCE (1902).	ITALY.
1. Secretary of State.	1. Secretary of State for Foreign Affairs.	1. Minister of Foreign Affairs.	1. Minister of Foreign Affairs.
2. Secretary of the Treasury.	2. Chancellor of the Exchequer.	2. Minister of Finance.	2. Minister of the Treasury. Minister of Finance.
3. Secretary of War.	3. Secretary of State for War.	3. Minister of War.	3. Minister of War.
4. Attorney-General.	4. Lord High Chancellor.	4. Minister of Justice.	4. Minister of Justice and Ecclesiastical Affairs.
5. Postmaster-General.	5. Postmaster-General.	5. Minister of Commerce.	5. Minister of Posts and Telegraphs.
6. Secretary of the Navy.	6. First Lord of the Admiralty.	6. Minister of Marine.	6. Minister of Marine.
7. Secretary of the Interior.	7. Secretary of State for Home Affairs.	7. Minister of the Interior.	7. Minister of Interior.
8. Secretary of Agriculture.	8. President of the Board of Agriculture and Fisheries.	8. Minister of Agriculture.	8. Minister of Commerce, Industry, and Agriculture.
9. Secretary of Commerce and Labor.	9. Secretary of State for the Colonies.	9. Minister of Colonies.	9. Minister of Public Instruction.
	10. Secretary of State for India.	10. Minister of Public Instruction.	10. Minister of Public Works.
	11. President of the Local Government Board.	11. Minister of Public Works.	
	12. President of the Board of Trade.		
	SINECURE OFFICES.		
	Lord President of the Council.		
	Lord Privy Seal.		
	First Lord of the Treasury.		

CHAPTER IV

THE JUDICIARY AND THE ELECTORATE

1. The Judicial Office and its Tenure. — 2. The Relation of the Courts to the Executive and to the Legislature. — 3. Administrative Law and Administrative Courts. — 4. The Electorate: Evolution of So-called Universal Suffrage; the Present Suffrage in Leading Countries. — 5. Criticism of Existing Systems; the Case of Women, of Negroes, etc. — 6. Representation of Minorities.

1. The Judicial Office and its Tenure. The judicial branch of the government, though less numerous than the executive (in its wider sense), occupies a position no less important in the organization of the state. The prime function of the judiciary, performed in all states, is to decide upon the application of the existing law in individual cases. The essential requisite in a judge is consequently an exact knowledge of the law. The work of the judiciary is thus a highly technical function, demanding for its proper accomplishment the trained intellect of a specialist. Whether the law is right or wrong, just or unjust, is a secondary matter: the duty of the judge is to adjudicate upon the law as it is, and not upon the law as it ought to be. It is far better that a bad law should work injustice in an individual instance than that a judge by deliberately refusing to recognize it should impair the principle of law itself.

In actual fact, however, judicial decisions are far more than merely declaratory in their nature; they contain a constructive element and serve to expand the existing law into a more and more detailed interpretation. For no statute can be so minute in its provisions as to contemplate all possible cases, and to admit always of only one construction. Where the letter of the law is silent, the judge is called upon to attach to it the meaning which may be considered "reasonable," that is to say, which is consistent with the general principles of morality and public policy. In countries such as England and the United States this principle is carried very far; for here the decisions once given are viewed as precedents for future ones. Such precedents are not, of course, absolutely binding, but the presumption, where identity of circumstances can be established, is vastly in their favor. The process of adjudication thus amounts to a supplemental form of legislation, and a large part of existing law is said to be "made" by the judges.

The nature of judicial functions, viewed in this light, clearly demands that the judiciary must be as impartial as is humanly possible. Not only must their own pecuniary interests be unaffected by the legal decisions given by them, but they must be removed entirely from the play of political interests. It is for this reason that in a well-ordered government the judiciary should be adequately paid by a compensation not affected by the number and nature of their decisions, and should enjoy permanent tenure of office and be independent of the good will or ill will of the other branches of the government. This object is adequately effected in the national government of the United States; the Constitution (art. iii, § 1) prescribes that "the judges, both of the supreme and the inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."[1] The same is true in the case of Great Britain. The English judges until the close of the seventeenth century held their office at the pleasure of the crown, a position obviously inconsistent with impartiality. The Act of Settlement (1701) declares that "judges' commissions shall be *quamdiu se bene gesserint*, and their salaries ascertained and established." Removal can only be made "upon the address of both houses of Parliament."[2] The position of the judiciary thus established has never been altered. The system has also been adopted in the British colonies. The permanent and independent tenure of the judges thus secured in the United States and in the British Empire, and found also in France, Prussia, and other leading countries is unfortunately not universal. The commonwealths of the United States are a notable exception. In many of these a false conception of the principle of popular sovereignty, and the vicious influence of the doctrine of "rotation in office" has led to the election of the judges by the people for a stated term of years. In some states, it is true, the judges are nominated by the governor or elected by the legislature; in some also they hold office during good behavior. But the majority of judicial positions in the state governments are held by election for a stated term, often as short as two years. Such an institution cannot be too strongly condemned. It exposes the judges to the influence of political and personal motives in their conduct on the bench, impairs the impartiality of their decisions, and inevitably lowers the character of the judicial body.

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[1] This does not hold good of territorial judges, whose term of office is fixed at four years.

[2] Anson describes this as a tenure "as regards the crown during good behavior, as regards Parliament at pleasure." It is practically a permanent tenure.

2. The Relation of the Courts to the Executive and to the Legislature. Certainty of tenure and of compensation guarantee the judiciary against being unduly controlled by the other branches of the government. The question next arises, whether and to what extent the officers of the legislative and executive departments are to be protected from the power of the judiciary. That their original appointment or election is not made by the judiciary goes without saying. But it must be further decided whether, while they are in office, the legality of their official acts is to be subject to the decision of the courts. Shall the judges have power to decide whether the legislature or the executive, or any part of the executive, has acted in excess of its lawful power? To an American unacquainted with foreign governments, the answer seems self-evident, for the principle of limited constitutional powers and responsibility before the courts lies at the basis of the American system. But on this most important point of public law, the usage of modern states is divided between two sharply contrasted systems. In the United States, the Latin-American Republics, Great Britain and her colonies, the officers of the government are responsible before the law courts. The complete legal immunity of the British sovereign, and the immunity (except by impeachment) of the President of the United States, are exceptions of a special nature which need not be considered in this connection. On the other hand, it is the prevalent usage in the continental countries of Europe that the ordinary courts of law have no power to question the legality or decide as to the constitutionality of the official actions of the legislative and executive officers. A closer consideration of the consequences of these antagonistic principles will show how greatly the relations of the government to the individual citizens are affected thereby.

The case of the British Empire is less complicated and may be treated first. In the United Kingdom every servant of the state (except the king) is responsible for his actions to the ordinary courts of law. "Every official," says Mr. Dicey,[1] "from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment or to the payment of damages for acts done in their official character but in excess of their lawful authority." Not only the members of the executive civil service, but the officers and men of the army are individually liable before the ordinary tribunals for any unlawful acts, even if performed at the command of a superior officer. "The position of a soldier," says the same authority, "may be, both in theory and practice, a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it."

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[1] *Law of the Constitution*, chap. vi.

In spite of the apparent anomaly involved in the last instance, the protection afforded to individual liberty by this responsibility of executive officers cannot be overestimated. In the case of the British legislature there cannot, of course, be any such thing as a statute made in excess of power. For since the Parliament (used here in its legal sense of King, Lords, and Commons) is supreme, every statute that it makes is legally a good statute and cannot be questioned by the courts. But the legislative enactments of any minor body (such as a county council) are always subject to be passed upon by the courts, and perhaps set aside on grounds of illegality.

It is in such countries as the United States that the principle of judicial decision on the validity of the actions of the government has the greatest consequences. Here, as in England, the officers of the executive are responsible to the courts for their official actions. But this is by no means all. For since the national and state legislatures are given by the Constitution only a certain definite and limited power, it becomes the duty of the courts to decide whether or not the legislature in the making of any statute has confined itself to the powers it legally possesses. Where such is not the case the court (though it cannot abolish or amend the statute itself) can refuse to apply it in the individual case before it, which is in practice equivalent to declaring the statute invalid. Americans are apt to regard this power of the courts as a necessary consequence of a written constitution. For how else, it might be asked, can the legislature and the executive be duly confined to the power granted them? Logical as this seems, it remains true, as will presently be shown in the cases of France and Germany, that the existence of a written constitution is not always accompanied by this revisional power of the ordinary courts of law. That such an institution should have grown up in the United States is one of the most felicitous features of American political evolution. The germ of its development is found under the colonial governments, from which in the last resort appeal might be taken against any action of the legislature or executive of the colony to the king in council. The written charters that had been so familiar in colonial history and still existed at the Revolution in Massachusetts, Rhode Island, and Connecticut prepared the way for written constitutions limiting the powers of the organs of government. The severing of the connection of the colonies and the crown rendered it necessary to substitute something for the appellate jurisdiction of the king in council. Even before the making of the federal Constitution (1787) the judiciary of the new state governments had begun to occupy this field. Several decisions of state tribunals are recorded in which acts of the legislatures are declared unconstitutional. In the report of a Virginia case in 1782 in which this point was raised, it is stated that "Chancellor Blair with the rest of the judges was of the opinion that the court had power to declare any resolution of the legislature or of either branch of it unconstitutional and void.[1]" The federal Constitution of 1787 did not in terms lay down this function of the courts; but the proper sanction for it is found in art. iii, § 2, and in art. vi, of the Constitution. "The Judicial

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[1] W. W. Willoughby, *Supreme Court of the United States*, chap. v.

Power," it is laid down, "shall extend to all cases . . . arising under this Constitution." Moreover "this Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby." The case of Marbury *v.* Madison (1803), in which an act of Congress was declared unconstitutional, definitely established the precedent for the later working of the national government. The constitutional relation thus established between the judiciary and the other branches is not, however, unique in the United States. In the Dominion of Canada, for example, the judiciary exercise an analogous power in their interpretation of the British North America act, and the judges under the federal system of the Australian commonwealth are entrusted with a similar function.

Widely contrasted with the relation in which the American courts of law are thus seen to stand as regards the Congress and the officers of the executive, is the position occupied by the courts in the chief continental countries of Europe. The latter, as we have seen, are (with the exception of Hungary) countries with written constitutions. Yet the courts of law are not found to exercise the function of declaring the acts of the legislature unconstitutional. In such countries as France and Italy this is not so surprising, for these are not federal governments, and the constitution in these cases is concerned only with the organization of the government, and with the protection of individual liberty, and not with the division of legislative power between central and local authorities. As a consequence of this the French courts do not question the validity of a statute. Conceivably a French statute might be grossly unconstitutional; a law, for instance, which professed to abolish the republican form of government would be in direct violation of the constitution. But in practice such do not occur. In the case of the German empire, which is federal, and which has a written constitution, one would expect to find the courts constantly called upon, as in the United States, to adjudicate upon the constitutionality of state and federal laws. In point of fact no such decisions are given. Isolated cases have occurred in which the courts (the federal as well as state) have declared certain statutes of the minor German legislatures to be in violation of the state constitution. But the legality of imperial statutes once made passes unquestioned. The bulk of authority, supported by the declaration of the Reichsgericht (or imperial court) itself, is in favor of admitting that such a revisional power exists. Other authorities take an entirely opposite view. Since no law of the imperial legislature goes into force until officially promulgated by the emperor, these writers regard the promulgation as itself supplying the necessary test of constitutionality. Be this as it may, the fact of the matter remains that imperial statutes are always accepted by the courts as valid. More noteworthy still is the fact that in the federal republic of Switzerland the same practice prevails; indeed it is a provision of the Swiss constitution that every statute passed by the federal assembly must be accepted as valid.[1]

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[1] Constitution, art. 113.

3. Administrative Law and Administrative Courts. But the absence of this revising power of the courts is not the only point in which Continental practice is at variance with that of America. The whole status of executive officers before the law is different. The principle by which every official in England and America is responsible to the courts for his official actions does not apply. On the Continent this form of liability is replaced by the regulations and procedure known as administrative law.[1] Under this system public servants acting in their official capacity are not subject to the jurisdiction of the ordinary tribunals, but can only be called to account before the administrative courts. These are specially constituted bodies composed for the most part of members of the executive. In France, for example, there is a graded service of administrative courts which exist parallel with the ordinary tribunals. In each department the prefect and his prefectoral council (appointed by the president) act as an administrative court. Special jurisdiction is exercised by the court of accounts, councils of revision (as to military recruiting), colonial courts of conflict, and certain councils for public instruction. Final jurisdiction is exercised by the council of state,[2] a body nominated by the president. A special body (the tribunal of conflicts), made up of equal representation from the two kinds of courts, together with the ministers of justice and two added members, decides on cases of disputed competence. The jurisdiction of administrative courts over official actions is not indeed quite without exception. "The ordinary courts have as a result of statutory provision the entire control of the matter of expropriation or the exercise of the right of eminent domain. Again, arrests made by the administration are under the control of the ordinary courts as a result of the Penal Code. It is true also that where the government or a department of the government becomes a party to an ordinary commercial contract the jurisdiction is in part given to the ordinary courts."[1] But in the main the statement holds good that in France, and in constitutional countries generally, conflicts between individuals and the administration are settled by the administration itself.

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[1] The term administrative law has more than one sense; as used in France (*droit administratif*) it refers not only to the law covering the relation of the administrative authorities towards private citizens, but also to the whole of the public law relating to the organization of the state. In English it is more commonly used in the former restricted sense. For the operation of administrative law in continental Europe the student may consult Simonet, *Traité Elémentaire de Droit Public* (1897), and Goodnow, *Comparative Administrative Law.*

[2] For the precise composition of this council, which is partly an advisory executive body and partly a judicial tribunal, consult De la Bigne

The administrative system of courts originated in France with the extension of the absolute centralized monarchy, which tended to supplant by royal officials the older local tribunals. The Constituent Assembly of 1789 expressly adopted the principle of executive courts for passing upon the acts of the executive. In doing this they hoped to free the executive from being unduly dependent on the judicial branch of the government, and found the warrant for their action in the familiar dogma of the separation of

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de Villeneuve, *Eléments de Droit Constitutionnel Français*, part i, chap. iii, § 2, art. iii.

[1] Goodnow, *Comparative Administrative Law.*

powers. "The constitution will be equally violated, if the judiciary may intermeddle with administrative matters and trouble administrative officers in the discharge of their duties. . . . Every act of the courts of justice which purports to oppose or arrest the action of the administration, being unconstitutional, shall be void and of no effect."[1] The principle thus established has been adopted by the successive governments that have ruled over France. Though nominally abolished at the inception of the third republic, the technical interpretation of the decree of repeal has been such as to render it ineffectual in practice. Theoretically dependent on the principle of distributed powers, it has really commended itself as a means of strengthening the hands of the executive government. Some writers have indeed sought to show that the administrative courts themselves afford a valid protection of individual liberty. But the bulk of the evidence seems to prove that the rights of the individual are of necessity sacrificed under a system in which the executive may be at one and the same time the aggressor and the judge of the aggression.

4. The Electorate: Evolution of So-called Universal Suffrage in Leading Countries. In speaking of the executive, legislative, and judicial branches of government, reference has frequently been made to the election of the officials of these departments by the people. Let us therefore conclude the discussion of the organs of government by a brief treatment of the electorate. The body thus designated is not identical with the whole body of citizens. A citizen means any individual member of a state, male or female, who owes it allegiance and who may claim its protection, but the electorate only includes those who under the suffrage laws of that particular state, enjoy the right to vote. The electorate, or voters, are sometimes spoken of as the "political people," to distinguish them from those who have no direct legal share in the conduct of public affairs. The French constitution of 1791, anxious to harmonize the principle of popular sovereignty with a very restricted suffrage, spoke of their two classes as "active and passive citizens."

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[1] Instructions to the Law of Aug. 16–24, 1790. Cited by Goodnow, *op. cit.*

The right of the general body of the people to vote for representatives to govern them is the corner stone of the free institutions of Great Britain and America. The origin of this representative government lies hidden at the very beginnings of Anglo-Saxon institutions. In Saxon England we find every township sending up an elected reeve and four men to represent it in the court, or general meeting, of the shire. It is presumed that in such early elections all free men had a part. But at the very beginnings of parliamentary government in England the right to vote tended to restrict itself to owners of land. This was only natural in a country like England in the fifteenth century, where wealth, social standing, and ownership of land were almost identical terms. A statute of Henry VI (1430) limited the right to vote in county elections to residents possessing a freehold worth forty shillings a year.[1] The value of money having changed since the fifteenth century in a ratio of at least one to fifteen, this means a quite high property qualification. Although the clause requiring residence fell into disuse, this statute governed the franchise in the English counties for four hundred years. In the boroughs, too, the suffrage, though varying greatly from town to town, rested for the most part either on the possession of real estate or the payment of taxes. Thus it came about that in the course of time the right to vote became permanently associated with the holding of property. This political fact was accompanied, as is usually the case, by an explanatory political theory. The property-owner was viewed as having a stake in the community, and his vote was regarded as the consequence, not of his personal citizenship, but of his property. In the American states in the early years of their independence this theory was prevalent. The suffrage, and with it the right to be elected, rested on quite restrictive property qualifications. Even in Revolutionary France the first constitution (1791) included among its "active citizens" only those who paid annually a "direct tax equal at least to the value of three days' labor."

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[1] Anson, *Law and Custom of the Constitution,* part i, chap. v, sec. ii, § 1.

But the democratic ideas which worked themselves out in the philosophy of the eighteenth century and in the French and American revolutions gradually led to the dominance of a quite different view. This was the principle of (so-called) "universal suffrage," or the right of all adult capable citizens to vote, by virtue of their being such, and irrespective of the holding of property. This doctrine was proclaimed by the Jacobins, or extreme republicans among the French revolutionists, though even among these only a minority considered that women should share in this "universal right."[1] The influence of the same theory was seen in America in the early part of the nineteenth century, when the states abandoned the principle of a property qualification, and moved nearer and nearer to manhood suffrage. In England too, where abstract political theories have but little weight, the practical injustice of the restricted franchise led to the long agitation culminating in the Parliamentary Reform of 1832. The various governments which have modeled themselves on those of Britain and the United States have adopted also the principle of universal suffrage.

In the democratic countries of to-day, the people entitled to vote represent a fraction of the population ranging from one fifth downwards. The general principle is that of the admission to the polls of all the adult male citizens of mental and moral capacity. The principle is extremely simple, and in some states is applied to the whole community by a single and comprehensive law. Thus, for example, in France, the law of July 7, 1874, grants the suffrage to all male citizens of France at least twenty-one years of age. Similarly the right to vote for members of the German Reichstag, the popular house of the imperial legislature, is granted by the constitution to all resident male citizens of the German Empire who have reached the age of twenty-five.[2] In the United States, the suffrage, though extremely democratic both in principle and practice, is extremely complex in its legal details. The Constitution leaves the matter in the hands of the state governments; in voting for members of the federal House of Representatives, the voters (Constitution, art. i, § 2) "in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." To this is to be added the provision of the Fifteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The suffrage laws of the separate states, though all agree in excluding persons under twenty-one years of age, vary very much in reference to qualifications and exclusions. Four of the states (Colorado, Idaho, Utah, and Wyoming) grant the full suffrage to women. Most of them admit as voters only citizens of the United States; others grant the suffrage to aliens, otherwise qualified, who have declared their intention to become citizens. The term of necessary residence in the state previous to voting varies from three months (Maine) to two years (Alabama and others); so also does the requisite term of residence (if any) in county, town, or precinct. The general list of exclusions comprises insane persons, idiots, and felons. Most states exclude paupers, and some specifically exclude the Chinese (California, Nevada, Oregon). In several of the Southern states peculiar suffrage laws are found which are intended to circumvent the Fifteenth Amendment in order indirectly to prevent the negroes from voting. Thus in Louisiana the voting list comprises all citizens of the United States who are able to read and write, or who own three hundred dollars' worth of property assessed in their names, or whose fathers or grandfathers were entitled to vote on January 1, 1867.

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[1] For the question of female suffrage during the French Revolution, Aulard, *Histoire politique de la Révolution Française*, may be consulted.

[2] Constitution of the Empire, art. 20.

In the case of the United Kingdom the parliamentary franchise is of the most complicated character. The reason for this is that Parliament has never seen fit to revise the existing franchise at a single stroke and to repeal all previous statutes and substitute for them a single and uniform suffrage law. Instead of this each measure of parliamentary reform has only partially repealed existing legislation. Three great statutes have been passed in the nineteenth century in extension of the right to vote. The Reform Act of 1832 widened the old county franchise by including tenants as well as owners of land, and gave the borough franchise to rate-paying householders occupying premises worth at least ten pounds a year. The Reform Act of 1867 further extended the franchise. Finally the Representation of the People Act of 1884 establishes both in towns and county a very democratic suffrage: a person entitled to vote must be of the male sex, at least twenty-one years of age; must be either the owner or the lessee of land or premises of a certain yearly value, the sum varying according to the nature of the tenure; or else must occupy or be a lodger in fixed premises of a certain yearly value, or on which the local rates have been paid. In addition to this persons may be qualified by virtue of the remnants of earlier unrepealed laws; they may for example be voters by virtue of being born and resident freemen of certain towns, or liverymen of one of the city companies of the city of London, or as graduates on the electoral roll of Oxford, Cambridge, Dublin, or London, etc.

The list of excluded persons comprises aliens not naturalized, idiots, convicted felons, and members of the peerage. It is impossible in short compass to give the exact details of the parliamentary franchise in the United Kingdom. For fuller information reference may be made to the first volume of Sir William Anson's "Law and Custom of the Constitution." The complex historical aspect of the present English suffrage and its practically democratic operation is highly characteristic of English political institutions. Little heed is taken of the logical requirements of abstract political theory provided that the practical operation is not, to an appreciable degree, repugnant to the demands of common-sense justice.

5. Criticism of Existing Systems; the Case of Women, of Negroes, etc. From what has been said of existing suffrages we may now turn to consider the validity of the theory of so-called universal suffrage. In the first place it is to be noted that the suffrage in question is by no means universal. It nowhere includes more than a minority of the population. It omits everywhere children and minors, and persons of unsound mind and of proven criminality. It leaves out almost everywhere the female half of the population. That the right to vote cannot be absolutely and literally universal requires no proof: no amount of political dogma could make it appear reasonable that a ballot should be deposited by a two-year-old child or by an incapable idiot. That the principle of exclusion must be adopted is an actual if not a logical necessity. It is extremely important to duly appreciate this fact. Universal suffrage everywhere omits a large number of citizens, and the reason is in every case that the excluded classes are composed mainly of persons who, in the opinion of those who vote, are not fitted to exercise the right of voting. It is to be observed that the excluded class is not in reality composed entirely of persons unfit to vote. No one would claim that no young men of twenty are ever fit to vote, and that all men over twenty-one are always fit to vote. The exclusion merely means that on the average persons under twenty-one have not the required capacity, and that those over twenty-one have it. It appears, then, there is no such thing in theory or in practice as an absolute and universal right to vote. Nor is the exclusion of any class of citizens, in and of itself, a violation of any abstract law of political justice. Every such exclusion must rest for its justification on the question whether the excluded persons are — taken on the average — not capable of the political judgment required in voting.

The general view thus obtained may be applied to two of the prominent questions of the time in regard to the suffrage, the right of women and of negroes to exercise a vote. The political rights of women have been much agitated during the last fifty years, but as yet no very great advance has been made in the direction of female suffrage. In the United States, as has been said above, four of the states grant to women on equal terms with men the full suffrage both for local and state elections. In addition to this women vote in school elections in nineteen states; they vote in Kansas in municipal elections; in Iowa and Montana when a vote of the citizens is taken on a proposed issue of municipal bonds, and in New York state by a law of 1901 women owning assessed village property have a similar voice in a local referendum. As against this it is to be recorded that the proposal to admit women to the full suffrage has recently been defeated in New Hampshire (1903) and in several Western states (South Dakota, Washington, Oregon). Nor is the extension of the right to vote for members of the national legislature granted to women anywhere in Europe, except in the case of widows who own property in the kingdom of Italy. In England women cannot vote at parliamentary elections, but, if qualified, may vote in any local elections. Women are granted the full suffrage in New Zealand and in the states of Australia. The suffrage in the latter case carries with it, as in the United States, the right to vote for members of the federal house of representatives.[1]

Historically considered the exclusion of women is only a part of the general economic and legal position of dependence in which women have been placed. Indeed the word "exclusion" is hardly applicable. What has happened has been negative rather than positive. Until quite recent times only a very small part of the men of the community had the right to vote. It is more accurate to say that the women have never been admitted than that they have been expressly excluded. The arguments of John Stuart Mill and others in favor of female suffrage have turned partly on abstract justice — the claim of every person, as a person, to vote — and partly on the idea that women are in the main as well qualified as men, or at any rate sufficiently qualified. The first contention seems quite invalid: the principle of exclusion is, as has been shown, a necessary one. The second contention remains still a debatable point. As against these arguments it has been urged that women, being mentally inferior to men in those particular aptitudes required for the proper exercise of political rights, had better be excluded. It is also claimed that women are for the most part dependent for their political convictions on the opinions of a husband, father, or other male relation; they are thus already represented in an indirect fashion, and to give them a vote would unfairly duplicate the voting power of their male relations. On these grounds a distinction is sometimes made between the claims of married and unmarried women.

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[1] See "Political Woman in Australia," *Nineteenth Century*, vol. lvi.

The other vexed question relating to the suffrage is that of permitting the negro race to vote. Every one knows that the Southern states — the white people of the Southern states — would never have conferred even a nominal voting power on the black race except by compulsion. This compulsion has been found in the amendment to the Constitution already mentioned. Its adoption was due partly to the desire to make use of the negro vote for political purposes, and partly to the force of public opinion generated by the idea that abstract principles of justice gave the negro a right to the suffrage. There has resulted the rather absurd situation whereby many persons in the United States have been ardent champions of the supposedly inherent political rights of the blacks while willing to apply an entirely different criterion to the case of women, both the white and the black. Women are excluded as unfit to vote, and blacks are included on the ground that nobody can be unfit to vote. The exact extent of political capacity of these two classes is a matter that would admit of some discussion; but it seems hardly reasonable to think that an illiterate and in many ways debased negro population can have a political claim superior to that of educated and intelligent American women. Unhappily a false and hopelessly abstract view of political rights and the rigidity of the federal Constitution prevents a rectification of the political error made in admitting the negroes to the suffrage. In practice the Southern states have found various means to render the negro vote largely illusory. But legally the anomaly persists.

6. Representation of Minorities. A question of especial interest in reference to voting is the representation of minorities. If the members of a national legislature were all elected out of the whole community on one "general ticket," — each voter voting as many times as there were places to be filled, — it is clear that there would be a minority group of voters who elected none of their candidates. So glaring an illustration of the "unrepresented minority" does not in practice occur. The need of representing at least a part of the people in each district naturally leads to the division of the whole country into districts from each of which a candidate, or a group of candidates, is elected. But even with such a division into districts, a number of the people in each throw away their votes on a candidate not elected and thus remain in a sense unrepresented. This evil may be aggravated if those in power so divide up the election districts as to make the most of the votes of the adherents of their own party and to make the least of the votes of their opponents. This is the process known as gerrymandering, and unfortunately only too familiar in modern politics. At times it is effected by so allotting the electoral districts that the adverse voters will be too few everywhere to carry any district. If this is impossible the districts are so contrived as to "bunch together" the hostile voters, and thus it results that when they do carry a district, they carry it by a needlessly large majority, and so practically lose a lot of voters.

Much attention has been given to the problem of how to represent the minority, and various schemes have been proposed for this purpose, and to some extent adopted. Of these a few may be mentioned. The most noteworthy of all, historically, is the scheme of Mr. Thomas Hare, which attracted considerable attention in England in the middle of the nineteenth century.[1] This was the plan of "self-made constituencies." Instead of dividing the country into districts, it was proposed that any candidate should be elected for whom sufficient votes were cast anywhere in the country. The number required was to be found by dividing the number of voters by the number of seats in Parliament to be filled. By this means any particular minority group, instead of being scattered in district constituencies, and everywhere swamped, could combine themselves into a united vote. The scheme, however, demands too elaborate a political activity on the part of each voter to be at all practical.[2]

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[1] Thomas Hare, *The Election of Representatives*, 1859.

[2] For criticism see Bagehot, *English Constitution*, chap. vi.

Another method of minority representation is the plan of "limited voting." This is used whenever several candidates are to be elected to form a board or council; it would not apply to districts where only one candidate is to be elected. Each voter is allowed to vote, not for as many candidates as there are places to fill, but only a limited number of times. For example, in the elections to a city council, there may be twelve places to fill, but each voter has only seven votes. The result is to elect seven members of one political party, and five of the other. No one party could elect all unless strong enough to divide its adherents into two distinct voting groups, and still defeat the other party. Such a system meets the case of representing a second party, but may, of course, leave a further majority unrepresented. Similar to this is the cumulative vote. In this plan, where a number of persons are to be elected, each voter may vote once for each of several candidates, or give all his votes to one. Thus, if twelve candidates had to be chosen, a very feeble minority could get a representative if each person gave all his votes to the same candidate.

In practically all elections it happens that the elected candidate gets more than enough votes to elect him. Only in rare instances will he happen to get just the necessary odd vote and no more. The surplus votes, therefore, again constitute an unrepresented minority. To meet this difficulty there has been contrived the device of "proportional representation." Here the voter is called upon to indicate not only his choice of a candidate, but the names he would choose as a second or third choice, and so on. The surplus votes of each elected candidate are then handed on to the voter's second choice, or, if not needed there, to the third, etc. The difficulty lies in deciding which are to be considered the tickets that elected the first candidate, and, consequently, to which one the votes are to be given away. In practice this can be done only by lot. This system has been put in practice in Tasmania, in the city constituencies.[1] Adverse critics have pronounced it an "arithmetical jungle." A quite distinct form of minority representation, directed towards a particular political end, is found in the elections of the kingdom of Prussia. It is used in the elections for the Prussian parliament, though not, of course, in those for the imperial Reichstag. The voters are divided into three classes, not numerically, but according to the taxes that they pay. If the total taxation of the district amounts to a certain sum, then the first class is made up of the richest property-owners in sufficient number to represent one third of the taxes. The second class represents the next third of the taxes, and the third class the rest. Each class chooses an equal number of "electors" for an electoral college, and this latter makes the actual selection of the members of Parliament. It can be seen at once that the two upper classes, voting together, though representing only a minority of the people, can absolutely outvote the third. Much the same plan is adopted in Prussian local elections. To American ideas this system is grossly unjust. The Socialist party in Prussia has largely abstained from voting in Prussian elections rather than accept a vote on such conditions. It can only be defended on the principle that property, not the citizens personally, is the thing to be represented in a legislative body.

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[1] See Jethro Brown, *The New Democracy.*

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CHAPTER V

FEDERAL GOVERNMENT

1. Importance of the Federal Principle; its Historical Development. — 2. The Different Kinds of Federations. — 3. Sovereignty in a Federal State. — 4. Utility of the Federal Principle in effecting a Compromise. — 5. Distribution of Power in Federal States. — 6. Conclusions.

1. Importance of the Federal Principle; its Historical Development. The subject of federal government is so important that it may well merit a separate chapter. The origin and growth of federation and the purpose it has served in the evolution of the past are among the most interesting topics of historical study. Of the political problems of our own time none are of more vital bearing than the relation of the local and central powers in a federal system. In the development of modern states the principle of federation has played a prominent part. It has supplied the requisite cohesive power to bind together the commonwealths that compose the United States, and the unequal monarchies and free cities that are joined into the German Empire. Mexico, Brazil, and Switzerland are federal republics. The British Empire is, as a whole, a unitary state, but its two most important dependencies, the Dominion of Canada and the Commonwealth of Australia, are, when considered separately, federal systems closely resembling that of the United States. As far as our present political vision reaches, it seems as if any attempt to create a universal state must proceed along the lines of federation. It may perhaps be reasonably thought that the experience now being gained in the construction of composite governments on a federal plan is supplying to civilized mankind the requisite training for the making of the world state of future ages.

It is impossible to overestimate the important part that has been played by federation in the history of political growth. Speaking broadly, one of the chief features in the evolution of civilized government has been the extension of the area covered by a single political unit or state. This extension has not of course proceeded always in a continuous chronological course. Modern Switzerland is but a diminutive state when compared with the Roman Empire. Yet it is true in the main that one of the most notable and most essential factors of political progress has been the increasing size of the territory brought into a single state.[1] To accomplish this, two great historical forces have been at work. Of these one is the principle of conquest, absorption, and expansion. The growth of the French monarchy and the spread of British dominion illustrate this. The other has been the principle of deliberate federal union, whereby a basis of compromise is afforded permitting the political junction of previous states which are too closely connected by situation, language, and customs to remain apart, but which are too unlike in area, local customs, etc., to permit of complete amalgamation. Of these two methods the one is the path of peace, the other is the path of war. No lasting union of the great states of the world can now be expected from the process of conquest. If united at all it must be only by means of a union which will destroy neither national pride nor national autonomy.

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[1] See also part i, chap iii, § 5, above.

In its broadest sense the term federation indicates any form of union entered into by two or more independent states. Numerous historical examples at once suggest themselves. At the very beginning of political history we have the famous Achæan league. This was originally a defensive alliance of twelve cities of the Peloponnesus, but in its later shape as revised in the third and second centuries (B. C. 281–146), this "after-growth of Hellenic freedom" assumed a more elaborate character. It included Corinth, Megara, and many other important city states of southern Greece. Each city retained the control of its own internal regulation, but surrendered into the hands of the league the control of foreign relations and war. "There was," says Professor Freeman,[1] "an Achæan nation with a national assembly . . . no single city could of its own authority make peace or war." Had it not been for the rise of the world power of the Roman Empire, such a league might have supplied a means of converting the Greek city state into a territorial national state. In later history the short-lived combinations of Italian cities in the thirteenth and fourteenth centuries may perhaps be spoken of as federations. A more conspicuous example is seen in the growth of modern Switzerland. Here the forest districts of Uri, Schwyz, and Unterwalden, still nominally subject to the emperor, banded themselves together for protection in 1291. The league thus formed grew in extent and power. Other districts and the free cities of Bern and Zürich were joined to it. The defeat of Austria in the end of the fourteenth century gave it a practical independence, which was finally confirmed by the treaty of Westphalia (1648). In the confederation thus formed each member retained its separate independence, mutual protection being the only purpose of the union. Though for a time amalgamated by the interference of the French Revolutionists into a republic, "one and indivisible," it was not until the changes effected by the constitutions of the nineteenth century (1848 and 1874) that Switzerland lost the appearance of a defensive league of separate states.[1]

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[1] Freeman, *Federal Government.*

A similar league was that existing between the independent states of North America under the Articles of Confederation (1781–1789). Here each state was a separate body politic. The only form of common control was exercised through the Congress, a body of delegates which had no power to compel the states to its will, and no power to command or to tax the individual citizens of the thirteen states. The federal Constitution, made in 1787 and put in force in 1789, established in the place of this a single federal state, in which the central government was brought directly in contact with the citizens. The course of the nineteenth century has witnessed several federations of historical importance. Of these, the Swiss constitutions of 1848 and 1874, the federation of the provinces of Canada into the Dominion (1867), the creation of the North German Confederation (1867) and the German Empire (1871), together with the recent federation of the commonwealth of Australia

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[1] Sidgwick, *Development of European Polity*, Lecture XXIX.

(1900), are the most salient examples. Other countries, too, such as Mexico and Brazil, have adopted the federal system of government, not as a means of increasing their area, but as a method of harmonizing local and national interests.

2. The Different Kinds of Federations. When we consider the various forms of union by which separate states may be joined together, it is clear that they present a graded series of increasing closeness. At one end of the scale is the offensive and defensive alliance entered into by sovereign states. Of this nature was the famous Family Compact of the eighteenth century, between the Bourbon monarchies of France and Spain. Such a union is extremely illusory in its nature, as, in the absence of any joint organ of government, it has no "sanction" or compelling force behind it. More advanced than this are confederate types such as the Achæan League, the German Confederation of 1815, or the Southern Confederacy. In this each participant state retains, in name at any rate, its sovereign character. It may happen that in such a union of states the formal act of union declares itself perpetual and at the same time declares that each state retains its sovereignty. This is quite inconsistent, for it implies that each state is free to leave the union, and at the same time bound to remain in it. Such, however, is the case with the American Articles of Confederation (in force from 1781 till 1789) and the constitution of the Southern Confederacy. Beyond this type of union lies the federation *par excellence*, — the federal state,[1] a new unit composed out of previously sovereign states, now united to form a new sovereignty, but each retaining its own political sphere independent of the legal power of the central government. Such is the nature of the present federal union of the United States. Beyond this again might be distinguished what could be called an amalgamation, or complete fusion by agreement. It differs from the expansion of a single state by conquest of territory, in that the participant members enter into the amalgamation or amalgamated state of their own free will. The best examples are found in the composition of the United Kingdom by the act of union of England and Scotland in 1707, and of Great Britain with Ireland in 1800. These unions were effected by similar statutes passed by the separate parliaments of the countries concerned. The unions declared themselves to be made on certain stated terms and conditions. But the process differed from federation in that in each case the parliaments which made the unions then went out of existence in favor of a new parliament which was legally sovereign, and not bound by the conditions of union. That this is more than a theoretical view of the case is seen in the fact that the British Parliament in 1869 abolished the established (Episcopal) church in Ireland, whose maintenance was one of the terms of the union of 1800. A similar case of amalgamation is seen in the "fusion" of the separate Italian states into the kingdom of Italy (1859–60). The product of such a process is a unitary and not a federal state.

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[1] Professor Burgess claims that the term "federal state" is not admissible, on the ground that a state is a unity. But while admitting that

it is illogical to speak of a confederate state, it seems reasonable to use "federal state" to mean a state of which the organization is federal.

The different kinds of united governments thus indicated have afforded ground for elaborate classification of the various species of confederacies and federal states. This has particularly interested the modern German writers on public law, some of whom distinguish a great many subdivisions. Such classifications have been undertaken by Laband,[1] Jellinek,[2] and others. Jellinek distinguishes, in the first place, virtual unions, such as Canada and Australia (legally part of the unitary British state) and legal unions. The latter he subdivides into (1) protectorates, etc., (2) unions of a superior and inferior state (Staatenstaat), seen in the case of Turkey and Egypt, (3) monarchial unions, in which two independent states are joined under a common sovereign, this again being subdivided into real and personal, according to whether the union is organic and deliberate (Sweden and Norway, before 1905) or accidental (England formerly with Hanover), (4) the confederacy (Staatenbund), and (5) the federal state (Bundesstaat). Other classifications are still more minute. Of all these fluctuating subdivisions American and English writers are generally inclined to throw aside everything except the distinction between a confederacy and a federal state. This is a vital point in public law and requires some explanation. A confederacy is not a single state. It is a collection of independent sovereign bodies united on stated terms for certain purposes. Each of them is, legally, free to withdraw from the confederacy when it pleases. A confederacy cannot therefore be permanent and indissolvable, for if it were so then the sovereignty of the component states would disappear. A federal state is a single state. Its subordinate parts may have been, though not of necessity,[1] sovereign states previous to the union; they cannot be so after the formation of the federation. Such a union becomes, legally, indissolvable so far as the action of the separate state governments, or of the central government, is concerned. It could only be dissolved by the constitutional amending process, where such exists. The interpretation put on the Constitution of the United States by the seceding states of the South would have made it a confederacy. The interpretation put upon it in the North made it a federal state.

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[1] *Staatsrecht des Deutschen Reiches.*

[2] *Das Recht des Modernen Staates.*

3. Sovereignty in a Federal State. This leads at once to the much-disputed question of the sovereignty in a federal state. Around this centred the great secession issue between the Northern and Southern states, for the retention by a component state of its sovereign power carries with it of course the right to withdraw from a federation of which it is a part. Let us consider the question first of all apart from the particular case of the United States. If what has been said above is correct, it follows, by definition, that the creation of a federal state annihilates the sovereignty of the component states, — not limits it or divides it, but annihilates it. For sovereignty either is or is not. But in the new state the sovereignty does not lie in the central government; it lies in the body, wherever and whatever it may be, which has power to amend the constitution. Legally speaking, this sovereign body can entirely abolish the federation and restore each member of it to its original independence. This is not the same as secession, but it carries with it the consequence that such a union is not legally indissolvable. In a confederacy, on the other hand, each state is still a sovereign state. There is properly no confederate law. Any common regulations adopted by a central body of the confederacy, and binding on the citizens of all the states, are law to any such citizen because adopted as law by his own state. Where law exists, a state exists. Where a state exists then it has sovereign power. It follows then that confederacy and secession are one and the same term in point of public law. In actual fact secession resolves itself into a question of force. Switzerland was an acknowledged confederacy from 1815 until 1848. Yet when the seven Roman Catholic cantons undertook to secede from it (1847) they were forced back into the confederation at the point of the sword.

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[1] Compare the case of the republic of Brazil; the constitution of 1891 puts the provinces on a federal basis, but they were not previously independent states.

In the United States the controversy did not turn on the difference between a confederacy and a federal state. It turned on the question whether the United States was the one or the other. On this point, as Professor Goldwin Smith has said, the "constitution proved itself a 'Delphic oracle.'" The language of the Constitution, especially when read in the light of the antecedent history of the confederacy of 1781–89 (which was virtually dissolved by the "secession" of eleven of its thirteen states[1]) admitted of either interpretation. But apart from the question of secession, many American writers, while admitting the federal union to be permanent, have taken quite a different view of sovereignty from the one here indicated. This is the theory of dual or divided sovereignty. In accordance with this view the sovereign power in a federal union, such as the American republic, is not located in any single authority but is divided or distributed between the federal and the state government. Such a theory is of course totally at variance with the whole conception of sovereignty explained in an earlier chapter. It is difficult to regard it as anything else than a confusion of sovereignty, which is complete and absolute, with constitutional power, which may be of any degree of limitation. If the federal and state governments represent a "division of sovereignty," then the three branches of the federal government represent a further subdivision, and so forth. In spite, however, of its inconsistency, the theory of dual sovereignty has found illustrious champions. President Madison devoutly believed in it. "It is difficult," he wrote, "to argue intelligibly concerning the compound system of government in the United States without admitting the divisibility of sovereignty." The American courts of the same period declared, "The United States are sovereign as to all the powers of government actually surrendered. Each state in the Union is sovereign as to all the powers reserved."[1]

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[1] When the Constitution went into force (March 4, 1789) two states, Rhode Island and North Carolina, were not as yet in the Union. They

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were certainly no longer in the confederacy, which had ceased to exist. Yet the articles had declared that "the Union shall be perpetual" (art. 13).

[1] For the subject of sovereignty under the American constitution,

4. Utility of the Federal Principle in effecting a Compromise. Returning from the question of the location of sovereignty to the general aspect of the federal state, it may be noted that the peculiar utility of the federal principle in political construction lies in the spirit of compromise which it embodies. Every small community or state is driven by the need of protection to seek for a union with its fellows. But a form of association which annihilates its own traditions of independent self-government naturally runs counter to the sympathies of its citizens. Still more is this the case if the communities to be united are of unequal magnitude. In this case a complete amalgamation into a unitary state would practically mean the absorption of the minor states into the large ones. The position of New Jersey, Delaware, and Connecticut at the time of the making of the Constitution was of this sort. Still more unequal was the federation long contemplated among the German states, and finally accomplished by the formation of the federal empire in 1871. The principality of Schaumberg-Lippe has an area of 131 square miles, and a population of about 40,000 persons; the kingdom of Prussia has an area of nearly 135,000 square miles and a population of 35,000,000. In all such cases as this the federal system supplies the means of creating a single state, combining the whole powers of its members for international defense and for matters of general interest, without sacrificing the individual life and political susceptibilities of the component parts. Even among "states" of relative equality, as in the

the student may consult Merriam, *History of the Theory of Sovereignty since Rousseau*, from which the above quotations are taken.

case of the majority of the forty-five states of the Union, the federal system has the advantage of permitting the legislation of each to accord with differences of environment caused by climate, racial elements, local custom, and antecedents. In the United States, more than anywhere else in the world, full advantage has been taken of the possibilities of the federal principle. Its history is largely a history of federations. In the earliest times of colonial history we have the formation of Connecticut by the federal union of its towns, and the establishment in 1643 of the New England federation uniting the northerly colonies for mutual protection. The quarrel with Great Britain in the eighteenth century brought the thirteen colonies into a union, which, after passing through the preliminary stages of the Continental Congress and the abortive confederacy of 1781, was finally consolidated into the present federal republic. The principle of political growth and constitution adopted in 1789 has governed the whole evolution of the United States during the nineteenth century.

5. Distribution of Power in Federal States. So much, then, for the historical and political aspect of the federal principle. Let us turn now to consider the important subject of the division of power between federal and subordinate authorities. It is not necessary in this connection to take account of any of the confederacies or federal governments previous to the formation of the Constitution of the United States. In these only the most elementary and necessary powers were allotted to the central government. But the federations of 1789 and of the nineteenth century offer an interesting series which may be studied with a view to discovering the teaching of experience in regard to the relative position of central and subordinate authorities. We may here best begin by stating the general principles of apportionment of power. The prime historical motive of federation has been the need of defense. It is therefore first of all requisite that the federal government should have control of the military and naval power. Closely connected to this is the necessity that in its dealings with outside states the federation should conduct itself as a unit. The control of foreign relations must therefore rest with the central power. Since neither foreign relations nor war can be conducted without financial support, it is further necessary that the federal government should have some power of taxation of the individual citizens. It is not enough that it should be able to requisition the component commonwealths for the money it needs: this was amply seen in the collapse of the finances of the old Confederation (1781–89). To cover urgent and temporary needs, the financial power must include the power to borrow. These three functions — the conduct of war and defense, the control of foreign affairs, and the power to raise money — are the prime essentials without which no federal state can exist.

As a second class of governmental duties may be ranked all those which are only effective in so far as uniformly and generally performed. Of this nature are the control of coinage, the regulation of patents and copyrights, and the conduct of the postal service. Third in the list will stand a variety of public affairs in which, though uniformity is not absolutely essential, it is nevertheless largely contributory to national progress. In this connection may be mentioned the control of the more extensive transportation facilities (those which constitute "interstate commerce"), — railroads, canals, telegraphs, etc., — the regulation of the banking system, and the establishment of a general tariff. The latter is a somewhat anomalous case. Federal control of a tariff is apt to find its place among the powers of the central government from financial reasons sooner than from economic. The tariff offers a convenient and somewhat surreptitious form of taxation. Though not theoretically a requisite power of the central government, it is in practice of great importance: tariff walls are a serious impediment to the consolidation of national life. To illustrate this one may refer to the tariff bickerings of the thirteen states under the Articles of Confederation, or to the case of the German states united in the confederation of 1815. In this last instance not only was each state a separate tariff area from the others, but the single states were subdivided, — Prussia was a political unit, but contained sixty-seven different tariff areas.[1] As a fourth class may be placed the debatable category of subjects whose allotment to the federal or component government is a matter of opinion and must depend on the circumstances of the case. Here the conspicuous examples are seen in the regulation of marriage and divorce and in the control of public education. Beyond this as the fifth and final class lie those duties which certainly ought to be left to the constituent governments to perform. Here again opinion may differ, but public works of merely local scope, public charities, the regulation of the liquor question, etc., are generally included.

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[1] See in this connection Seignobos, *Political History of Europe*, chap. xiv.

With this outline let us now briefly compare the actual distribution of powers in the chief federations under our notice. We may begin by quoting the legislative powers assigned to Congress by the Constitution of the United States.

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

"To coin Money, regulate the Value thereof, and of foreign Coin, and to fix the Standard of Weights and Measures;

"To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

"To establish Post Offices and post Roads;

"To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

"To constitute Tribunals inferior to the Supreme Court;

"To define and Punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations;

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

"To Provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the Discipline prescribed by Congress;

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—And

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[1]

It will be seen at once that apart from the special provisions relating to the Indians and the District of Columbia, there are no powers granted here that have not been given to the central government in all the later federations. The national government receives by this article but little more than the necessary powers of government. The residual power of government — the authority to control those things for which no special provision is made — is elsewhere explicitly withheld from it.

Let us place in immediate comparison with this the allotment of power between the federal and provincial governments in the Dominion of Canada. The basis of the constitution of Canada is a statute of the British Parliament named the British North America Act of 1867. The provisions in respect to the distribution of power are in the ninety-first, ninety-second, and ninety-third sections of the act. They are particularly interesting in the present connection because they are based on the arrangement made in the Constitution of the United States revised in the light of subsequent political experience. In addition to the powers possessed by Congress, the legislative power of the Dominion Parliament extends to the criminal law, marriage and divorce, interest, and the raising of money by any mode or system of taxation. Other things, such as banking, etc., are included which are not explicitly granted to the Congress and to which the federal authority in the United States only reaches by interpretation of implied powers. In addition to this the statute enacts that the Dominion Parliament has legislative power "in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the Provinces." The amount of federal power expressly granted contrasts strongly with the section of the American Constitution quoted above. Even as compared with the power of Congress when expanded by the doctrine of implied powers, the control of the Dominion over such items as the criminal law represents a considerable increase of federal authority.

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[1] Art. i, § 8.

Closely following upon the making of the Canadian constitution, we have the constitutions of two important federal states still in operation. These are the constitution of the German Empire (1871) and that of Switzerland (1874). In each of these the scope of the central power is far wider than in that of the United States. In Germany the constitution, together with an amendment of December 20, 1873, grants to the federal government the control, not only of the things within the jurisdiction of Congress, but also the criminal law, civil law and judicial procedure, banking, medical practice, railroads (except in Bavaria), the regulation of the press, of trades, insurance (including workingmen's insurance and pension laws), and other matters.[1] In Germany the legislative scope of the central government is vastly greater than in America. Its action in the administrative direction is less, since the principle of decentralization is here adopted and the federal measures (tariff, etc.) are carried out by the authorities of the constituent governments. The action of the central government is further narrowed in practice by the use that is made of the principle of concurrent jurisdiction. In many of the matters mentioned above the power of the federal government is not exclusive. Where the federal government has not seen fit to act, the states are free to exercise a legislative power. This applies for example to the control of railroads, medical practice, the criminal and civil law, etc. The federal jurisdiction is only exclusive where from the nature of the case it must be so (such as raising of money on the credit of the empire) or where it is expressly stated (for example, the taxation of imports).[1] To prevent conflict of authority it is provided that a federal law always overrides a statute of one of the constituent parts of the empire. This same principle of concurrent jurisdiction obtains of course in the United States, but to a much less extent; most of the powers granted to Congress are forbidden to the commonwealths, but in some matters, such as bankruptcy laws, they may act in the absence of federal legislation.[2] The present constitution of Switzerland (1874), together with the amendments since added, shows a wide range of federal power. "The legislative authority of the national government," says Professor A. Lawrence Lowell,[3] "is much more extensive in Switzerland than in this country, for in addition to the powers conferred upon Congress it includes such subjects as the regulation of religious bodies and the exclusion of monastic orders, the manufacture and sale of alcoholic liquors, the prevention of epidemics and epizoötics, the game laws, the construction and operation of all railroads, the regulation of all labor in factories, the compulsory insurance of workmen, the collection of debts, and the whole range of commercial law." To this may be added the fact that the federal government has the power (under the constitution) to compel the cantons to establish compulsory secular education, gratuitous in the primary schools. The Swiss government has, however, no power to levy direct taxes.

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[1] Imperial Constitution, art. iv.

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[1] Imperial Constitution, art. xxxv.

[2] This subject is well treated by Burgess, *Political Science and Constitutional Law*, vol. ii, chap. vii.

[3] *Governments and Parties in Continental Europe*, vol. ii, chap. xi.

As a concluding instance let us notice the position of the central power in the recent federation of the Australian colonies. The Commonwealth of Australia, considered apart from its connection with the British Empire, is a federal unit made of six separate "states."[1] Its constitution, like that of Canada, is found in a statute of the British Parliament enacted in 1900, under the title of the Commonwealth of Australia Constitution Act. The legislative power of the federal parliament is laid down in great detail.[2] It includes all the essential and virtually essential powers already treated, such as defense, taxation, postal service, tariffs, interstate commerce, etc. In addition to this the federal authority is explicitly declared to extend to bounties on production or export, insurance (other than state insurance), marriage and divorce, invalid and old-age pensions, foreign corporations, acquisition of state railways (with consent of the state), railway construction (with similar consent), railroad control even without consent if needed for military purposes, conciliation of industrial disputes, if not confined to a single state, immigration, influx of criminals, and other minor matters. It is interesting to notice the use that is made of the principle of concurrent jurisdiction. The German constitution had, as we have seen, deliberately adopted this plan. The British North America Act, on the other hand, tries to indicate the powers of Dominion and provincial governments as exclusive of one another; in practice this has led to confusion. In Australia only a few of the powers are expressly declared exclusive (§ 52). In the majority of instances the state government may act where the federal government has not done so. But, as in the German Empire, "When the law of a state is inconsistent with a law of the commonwealth the latter shall prevail." This last provision must not be misunderstood. The law of the commonwealth in question must not transcend the constitutional power of the federal parliament, otherwise its application can be declared invalid by the courts, just as in America.

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[1] Rightly or wrongly the Australians have adopted the term states as the official designation of the component parts of their federation. Since the whole body is officially called the Commonwealth, we find the terminology used by Professor Burgess and other American writers exactly reversed.

[2] Constitution Act, part v, § 51 and § 52. A good commentary is given by Professor Harrison Moore, *The Commonwealth of Australia*, chap. v.

6. Conclusions. From the foregoing comparison of the chief federations of the nineteenth century, important conclusions are to be drawn. There is manifest throughout the tendency to entrust the central or national government with a wider and wider sphere of authority. For this several reasons are to be assigned. In the first place it represents a process that is altogether natural, and which may rightly be spoken of as organic. The units of the federation once brought into contact begin to grow together, and to be knit into a more and more united body. The original jealousy and particularism of the separate parts are gradually merged into the wider outlook that accompanies a larger national life; the central government of the federation becomes a part and parcel of each individual citizen, and enlists in its support a broader patriotism than narrow adherence to the interests of his section of the community. Where the sense of natural greatness is involved constitutional limitations can be overridden with public approval; the addition of Louisiana to the territory of the United States at once suggests itself in illustration. An equally potent factor leading to the extension of federal power is found in the material conditions of modern life. Rapid transportation, the telegraph, and the evolution of production and commerce on a scale undreamed of at the making of the Constitution have broken down the economic barriers that once existed. Communities that were originally absolutely distinct in their economic and social life have undergone a complete industrial amalgamation. Each administers to the wants of the other, and each in turn receives a benefit. The wheatfields of the Dakotas and the factories of Massachusetts are complementary to one another. Where industry and commerce are thus fused into a single economic life, it is impossible to separate the control of them into distinct territorial districts. It becomes an absolute necessity that the powers of the federal government must be either so expressed or so interpreted as to cover the whole range of economic life that has passed the bounds of the component "states" and become national. It is for this reason that the process of addition to federal power may be expected to continue in the future. Before the intruding forces of industrial civilization "state lines" are becoming more and more meaningless. Moreover, the true path to be followed has been already indicated by the German and Australian constitutions. By adopting the plan of concurrent jurisdiction and leaving it to the central government to occupy the field in proportion as the progress of national evolution demands it, a way is open for continued expansion without suffering the pangs of amendment, or relying upon the strained interpretation of the law.

We have still left out of consideration the question of how the American Constitution, made at a time when local jealousies prescribed the most grudging admission of federal power, is able to adapt itself to the changed situation of to-day. That this is not done by legal amendment has been already shown: the amending machinery of the Constitution is so rigid and immovable that it is valueless for the kind of adaptation here demanded. But instead of technical amendment a process of virtual amendment has been effected continuously through the nineteenth century by the interpretation given to the Constitution by the courts. The Constitution is fortunately an elastic document, capable of meaning much or little at the will of its interpreter. The courts therefore have fallen back on the doctrine of "implied powers," and have stretched the Constitution to cover things never contemplated in its literal meaning. "A power vested," said Chief-Justice Marshall, "carries with it all those incidental powers which are necessary to its complete and efficient execution." The purchase of Louisiana, the Embargo Act of 1807, grants of land for railroads and canals, the annexation of Texas, grants of land for agricultural colleges, etc., are not things for which direct authority can be found in the enumerated powers of the federal government.[1] It is by interpretation only that Congress has the power to issue paper money, to make anything it wills legal tender, to charter and regulate national banks, to claim a monopoly of the postal service. It is probable that, if future needs demand it, the Constitution can be held to permit the national government to build, buy, and own railroads, and to monopolize the telegraph service. That this device of latitudinarian interpretation has filled a most useful historical purpose is beyond a doubt. It is an excellent example of the political genius inherent in the Anglo-Saxon temperament, that the difficulty created by the error in making amendment so rigid should be surmounted by so simple and natural a remedy. The error remains an error nevertheless. The Swiss or Australian system, whereby recurring amendment is part of the life of the constitution, is greatly to be preferred.

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[1] See Andrews, *Manual of the Constitution*, p. 135.

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CHAPTER VI

COLONIAL GOVERNMENT

1. The Acquisition of Dependencies. — 2. Colonies of the Ancient World. — 3. Colonial Expansion after the Discovery of the Sea Route to the East Indies and the Discovery of America; Spanish Colonial System. — 4. Colonial Policy of England and France in the Seventeenth and Eighteenth Centuries. — 5. The American Revolution. — 6. Alteration of British Colonial Policy in the Nineteenth Century; Establishment of Self-Government. — 7. Present British System of Colonial Administration. — 8. Imperial Federation. — 9. Recent Colonial Expansion of European States. — 10. The Dependencies of the United States.

1. The Acquisition of Dependencies. Taking the word colony in its widest sense to include all kinds of dependencies, we are met by the fact that the colonies of the world occupy two fifths of the land surface of the globe, and contain a population of half a billion people. Great Britain has at least 350,000,000 colonial subjects, France 56,000,000, the Netherlands 35,000,000, Belgium 30,000,000, and Germany about 15,000,000.[1] The political status of the communities thus controlled presents the greatest diversity. In the strict theory of law each of them is under the absolute dominion of the sovereign state to which it "belongs." In practice they vary, from the virtual independence enjoyed by Canada and Australia to the total dependence of Gibraltar or Madagascar. The vast extent and the great natural resources of the modern colonial area indicate its importance in the future history of the world. The realization of this by the great powers has led, during the past twenty-five years, to a renewed colonial expansion, in which practically all the "unclaimed" territory of the world has been partitioned among the leading states. The subject of colonial administration, both political and economic, has taken on, in consequence, an increased interest, and attention is more and more directed to the study of the systematic management of dependencies. The recent expansion of the United States resulting from the war with Spain has rendered this portion of the study of government one of especial consequence to Americans. The present chapter, therefore, will be directed towards an inquiry into the origin and evolution of colonial government, the different systems of administration now employed, and the question of the political future of colonies. Throughout the chapter it will be proper to devote most attention to the colonies of the United Kingdom. Great Britain has been, *par excellence*, and still is, the colonizing country; and it is by the British government, in a somewhat groping and half-conscious way, that what may be called the modern system of colonial administration has been worked out. The new dependencies of the United States will be examined in conclusion in order that their present government may be discussed in the light of British experience in the past.

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[1] Statistics taken from the Bureau of Statistics publication, *Colonial Administration* (1901).

A sovereign state comes to possess dependencies in various ways. The simplest is that of conquest, by which the vanquished community is subjected to the rule of its victors. Such was the case with the expansion of Rome, whose "provinces" were countries conquered by the Roman arms. The Spanish colonies of Mexico and Peru, and the British dominions in India, were the fruits of conquest. Closely akin to this is the acquisition of a colony by cession. A country possessing a colony may be compelled by defeat in war to cede the colony as the price of peace, or induced from commercial reasons to sell it. The numerous treaties of the eighteenth century, whereby France and England handed their colonial possessions back and forward, were of this sort. The cession of Canada by France (1763), and of the Philippines by Spain (1898), are instances of colonial acquisition by war, while the purchase of Louisiana (1803) illustrates the purely financial process of acquisition. In addition to these two modes of colonial aggrandizement there remains what may be called, *par excellence*, the colonizing process, namely, that of occupation and settlement. In this case the claim to the colony rests, if not on actual discovery of the land (Newfoundland, Australia, etc.), at any rate on priority of actual occupation. Where a native population is found in fixed agricultural settlements, the assumption of control approximates to conquest. But where the native population is sparse and migratory, merely wandering over the land in nomadic fashion, living on the bounty of nature and the fruits of the chase, their presence ought not to invalidate the claim of immigrants proposing to make a permanent and fixed settlement. Much sentiment has been wasted over the supposed claim of the Indians to the continent of North America. When it is recalled that the whole Indian population, from Newfoundland to Florida, and from the Mississippi to the sea, was about as numerous as the inhabitants of a large American city (probably about 200,000), and that its settlements were only in a few places fixed and agricultural, its "claim" to ownership of the whole country becomes somewhat absurd. One may well ask how far such reasoning should be carried. Did the few starveling bushmen of the desert and forest of Australia own the whole continent? Without accepting the brutal code of the right of the strongest, one may in all reasonableness recognize the right of civilized nations to the acquisition of territory which is only "squatted upon" by wandering savages.

2. Colonies of the Ancient World. Of the colonies of the ancient world those of Greece and Phœnicia along the shores of the Mediterranean are the most noteworthy. The Phœnician settlements were for the most part merely trading stations, but there were exceptions also (such as Carthage) in which a large body of emigrants established a permanent agricultural settlement. The colonies of Greece were on a larger scale: they resulted first of all from the Dorian invasion of the Peloponnesus about 1000 B. C., which drove many fugitives to seek new homes. Similarly the conquests of the Spartans and the inroads of the Persians occasioned a scattering of some of the conquered tribes. Other colonies were due to the political dissensions with which the restless city states of Greece were rife and which sometimes resulted in the deliberate withdrawal of a part of the citizens to found a new city elsewhere. But the establishment of Greek and Phœnician colonies did not involve what we now think of as colonial government. Athens, indeed, succeeded in exacting money tribute from the cities she had planted in the Ægean Sea, basing her claim on the naval protection afforded them. But the general practice was to regard a colony as an independent political unit from its inception. It was an emigration, an "outswarming" of freemen who carried with them the same right of self-government that they had had in their former home. A somewhat different type of colony made by settlement in ancient times is seen in the Roman *colonia*. This was a settlement of Roman soldiers on land allotted to them by their general after it had been conquered; here the prime object was to create a frontier defense of the empire, but these colonies often developed into permanent settlements.

3. Colonial Expansion after the Discovery of the Sea Route to the East Indies and the Discovery of America; Spanish Colonial System. It is with the discovery of the sea route to the East Indies and of America that modern colonization begins. The sixteenth century opened to the adventurous spirits of Europe a wonderland of unknown countries, in which to satisfy their passion for exploration and adventure, their lust for gold, their chivalrous ambition to increase the dominions of their king, and their pious desire to spread the Christian religion to the uttermost parts of the earth. It was in this age of adventure and conquest that Spanish and Portuguese colonial aggrandizement acquired the peculiar characteristics of domination and levying of tribute which proved its ruin. The Portuguese, sailing around the Cape of Good Hope, secured a monopoly of the rich trade of the East. Thither their merchants flocked in great numbers, setting up trading stations on the coast of Africa (Sofala, Zanzibar), on the shores of the Indian Ocean (Goa, Malacca, etc.), among the East India Islands, and even in China and Japan (1542). In Brazil, partly by sending over exiled Jews and transported criminals, they founded a plantation colony in which the sugar cane was cultivated and to which slaves were early introduced from the coast of Guinea. Feudal grants of land were made to nobles of Portugal with almost absolute power over the natives. The Spaniards, equally adventurous, directed themselves not to the East, but to the West Indies, and to the mainland of Central and Southern America. A bull of Pope Alexander VI (1493) had divided the unchristian world with magnificent generosity between Spain and Portugal; Spain was to have the western world, Portugal the east. A revision of the shares by treaty gave Brazil and Labrador to Portugal and all the rest of America to Spain. The Spaniards proceeded to make good this shadowy claim by vigorous conquest. By the year 1510, Cuba, Hispaniola, Porto Rico, Jamaica, and other islands had fallen an easy prey. Mexico was conquered by Cortes (1519–21), and Peru fell before the brutal conqueror Francis Pizarro (1525–35). Thence Spanish dominion spread over the whole of Central and South America, except Brazil.

From the very beginning, however, the colonial system of Spain[1] had taken a false bias. The colonial establishments were regarded solely as a source of profit to the conquerors. There was no question of real self-government or liberty of trade. A recent writer[2] has thus described the Spanish system of administration in the centuries which followed: "All the laws, the control of trade, commerce, agriculture, finance, taxation, the foundation of municipalities, the management of the natives, and the regulation of religion were made in the mother country, and sent to the colonies with the expectation that the colonies would adapt themselves to the laws. Nor did the decrees of the crown and its agencies stop here, but the home bureau organized the colonial government, local and central. The officers and rulers were natives of Spain sent out to rule their distant dependencies. During the Spanish domination in America nearly all the important offices of the state and church had been filled by Spaniards. The presidents and judges of the courts were from Spain. There were 18 Americans out of 672 viceroys, captains-general, and governors; and 105 native bishops out of 706 who ruled in the colonies. This system of officialism continued in all of the colonial possessions of Spain to the close of the present [the nineteenth] century." In matters of trade and industry the Spanish colonies were under the most stringent regulation. They could trade with no other country but Spain itself, and even then only through the organization known as the Casa de Contratacion, which held a monopoly. That such a system contained in itself the seeds of its own ruin is only too evident. The revolt of the Spanish colonies and the establishment of their independence in the early part of the nineteenth century were the natural outcome of such a vicious and short-sighted colonial policy.

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[1] See Zimmermann, *Die Europäischen Kolonien*, vol. i (1896).

[2] Professor Blackmar, U. S. Bureau of Statistics Publication, *Colonial Administration* (1901).

4. Colonial Policy of England and France in the Seventeenth and Eighteenth Centuries. Although England and France were early in the field with voyages of exploration (Cabot, 1497, Cartier, 1534) the establishment of their American colonies belongs to the seventeenth century. With Champlain's permanent settlement on the St. Lawrence (1603), and the landing of the Pilgrim Fathers (1620) the beginnings were laid of New France and New England. From the grant of the charter to the Virginia Company, 1606, dates the commencement of the plantation colonies of the South. That the English colonies grew and flourished on the Atlantic is to be attributed to the good fortune of the English government, rather than to its political foresight. The sterling qualities of the colonists themselves, animated by the high purpose of religious refugees, or by the daring of adventurers, had much to do with their success. It was through the neglect, and not by the policy, of the home government, that the colonists acquired their political right of self-government. The charter granted to the Massachusetts Bay Company in 1628 was intended by the government as a sort of commercial instrument for the conduct and governance of a trading company. It was the emigration of the officers and the company itself to the shores of America which converted it into a political constitution. In the seventeenth century the English in general did not dream of the magnitude of the colonial empire which lay within their reach. In this their colonial policy was sharply contrasted with that of France. The French government early recognized the possibilities of American colonization; they realized the value of the St. Lawrence and the Mississippi as opening the way to the interior of the continent, and planned a vast colonial empire which should encircle the narrow English settlement of the Atlantic seaboard. The English government in the seventeenth century gave little or no help to its dependencies; the French were ready from the first with money and ships to be used in the upbuilding of New France. It has been part of the irony of history that the magnificent empire thus planned by the French should have passed by the fortune of war into the hands of the British crown.

But before the close of the seventeenth century, the American colonies, from their growth in population and the development of their resources, began to assume a new importance. The colonial trade offered a harvest to the merchants of the mother country, and supplied a new bone of contention to vex the long-standing quarrels of England and France. Indifferent as the British government had been to the political position of its earlier colonists, it adopted in reference to the growing trade of the colonies a policy much resembling that of Spain. So too did the French, whose colonial schemes included, of course, the profit to be derived by the mother country from the natural wealth of its possessions. Already in the reign of Charles II the navigation acts[1] had placed restrictions on colonial commerce. By the first of these (1660) foreign ships were forbidden to trade with the colonies. All colonial sugar, tobacco, cotton, indigo, and other enumerated articles were to be sent only to England, or to an English possession; nor could foreigners become merchants in an English colony. A new act of 1663 kept out all ships that had been built in foreign countries. An act of 1664 obliged European goods, even if placed in English ships, to be first landed in England before being exported to the colonies. Finally, an act of 1672 made goods passing from colony to colony liable to whatever customs duties they would have incurred if brought into England. These are the famous navigation acts which formed the basis of the English colonial policy of the eighteenth century. It was necessary indeed to modify them by making concessions to the colonists where they became too burdensome. The trade in wine and fish between Portugal and New England was made an exception. On the other hand the acts were reënforced by a number of statutes in the early part of the eighteenth century. Such a commercial code, if applied to a modern colony, would appear monstrous. It can however be said in defense of the acts, that they helped to encourage the growth of British and colonial shipping, and thus contributed to the national defense of both the mother country and the colonies. Nor did the restrictions laid upon trade press as severely upon the colonies as might be imagined. Evasion of the laws was notorious, and in any case the natural direction of commerce was to the British Isles. Less defense can be found for the policy of Great Britain in legislating in the eighteenth century against colonial manufactures. "The creating of manufactures in the colonies," ran a resolution of the British House of Commons in 1719, "tends to lessen their dependence on Great Britain." In accordance with this a statute of that year, fortunately applied only in part, forbade all forms of iron manufacture in the American colonies. Indeed, when all is said, the whole code of commercial and industrial regulation must be considered as the outcome of the inveterate European habit of viewing colonial establishments as a source of mercantile profit. "The deliberate selfishness of English commercial legislation," says Mr. Lecky, "was digging a chasm between the mother country and her colonies, which must inevitably, when the latter had become sufficiently strong, lead to separation."[1]

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[1] For the contents of the navigation acts and a criticism of British colonial policy involved, the student may consult Egerton, *Short History of British Colonial Policy*, a really admirable work.

5. The American Revolution. The quarrel between England and her American colonies which ended finally in independence is the most important fact in the evolution of colonial government. It showed to the world the elementary fact of colonial administration, that no civilized colony of size and increasing population can be kept in a state of permanent political tutelage. It led England to adopt, not immediately but ultimately, the policy of colonial autonomy. What had previously been done through neglect was now sanctioned by the teaching of experience. Yet, as in every quarrel, there were certainly two sides to the question. On the one side was the righteous protest of a free people against political dictation, against that "taxation without representation," the very sound of which is repugnant to Anglo-Saxon ears; on the other side were pressing needs of imperial defense.[2] The patriotism of national historians has long obscured the one or the other of the two sides of the controversy; it is only after a lapse of a century and a half that a clearer vision is becoming possible. That the American resistance to imperial taxation in the form in which it came to them was justified seems beyond a doubt. But the colonies were equally wrong in adopting towards the vexed question of imperial finance the selfish inertia of indifference. Unkindly critics have not scrupled to say that it was not "taxation without representation" that they resented, but taxation in any form and by any authority. The strain on the imperial treasury of protecting British subjects, both home and colonial, against foreign powers had been great. The successive wars against France — King William's war (1689–97), Queen Anne's war (1702–13), King George's war (1744–48), and the French war (1756–63), to give them the names by which they were known to the colonists — had increased the national debt at an alarming rate. Amounting in 1702 to a little over twelve and a half millions pounds, it stood at over one hundred and thirty-two millions at the Peace of Paris (1763). Much of this had been spent in defense of the American possessions. The colonies indeed had contributed, in separate fashion and in unequal proportion, both money and men to aid the British arms in America. It was a colonial expedition that captured Louisburg in 1745, the money thus spent being partly reimbursed by a parliamentary grant from Great Britain. But colonial contributions for defense were irregular and unequal. The colonies removed from the scene of immediate danger were inclined to shirk responsibility altogether. During King George's war the New York Assembly proved quite intractable. At first they would do nothing for defense; later they contributed money sparingly for the Louisburg expedition, but would send no men. New Jersey was an inveterate delinquent. Sheltered by the adjacent colonies from the actual ravages of frontier warfare, she was never ready to make adequate contribution towards the common defense. In Queen Anne's war the Assembly struggled hard to prevent the raising of a military force, and was only forced into doing so by the packing of the house. Contributions were made to King George's war, but in the great final struggle of the French war New Jersey remained culpably inactive.[1] These were not isolated instances, but were characteristic of the difficulty of obtaining joint action from the colonial governments. Mr. Lecky thus describes the situation: "In order to raise the money for the support of the American army it was necessary to have the assent of no less than seventeen colonial assemblies. The hopelessness of attempting to fulfill these conditions was very manifest. If in the agonies of a great war it had been found impossible to induce the colonies to act together; if the Southern colonies long refused to assist the Northern ones in their struggle against France because they were far from the danger; if South Carolina, when reluctantly raising troops for the war, stipulated that they should act only within their own province; if New England would give little or no assistance while the Indians were carrying desolation over Virginia and Pennsylvania, what chance was there that all these colonies would agree in time of peace to propose uniform and proportionate taxation on themselves in support of an English army?" The financial difficulty to be faced was thus an actual one, though aggravated by the mistaken policy of the British crown. The colonies and the mother country had reached an *impasse;* further continuance on the existing basis was no longer possible; the only solution could have been found in a joint revision of inter-imperial relations; this the dull stupidity of the English administration and the willful inertia and mutual jealousies of the colonies rendered impossible.[1] It is of importance properly to appreciate the historic situation thus created; for the relative financial situation of Britain and her colonies is now reproducing itself on the horizon of the twentieth century. To this attention will be directed later.

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[1] W. E. H. Lecky, *History of England in the Eighteenth Century*, vol. iii, chap. xii.

[2] The English side of the controversy is to be found in Lecky, *History of England in the Eighteenth Century*, vol. iii, chap. xii; and Egerton, *Short History of British Colonial Policy*, bk. ii (*passim*).

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[1] See Lodge, *Short History of the English Colonies in America*, chap. xiv.

6. Alteration of British Colonial Policy in the Nineteenth Century; Establishment of Self-Government. In what has been said above it is not meant to imply that the system of self-government in the colonies was established at once after the American Revolution. Indeed, for the time being, the case was rather the contrary. The king and his ministers, attributing the disaster of their colonial system to the license allowed to the colonial assemblies, were inclined to tighten their grip upon their remaining dependencies. The Quebec act of 1774 established royal government in Canada with no elective assembly, but only a council nominated by the crown. Even under Pitt's constitutional act of 1791 the measure of liberty granted to the Canadians, and intended to reward the allegiance of the Loyalists, consisted only in the right to elect the members of the lower house in each of two provinces. The governor, the executive council, and the legislative council or upper house, were all appointed by the crown. The same is true of the other North American colonies. Those that already had partial self-government (as Nova Scotia, Barbadoes, Jamaica, Bermuda) were not deprived of it, but those newly acquired (Trinidad, etc.) were kept under crown government. Cape Colony, definitely ceded in 1815, remained under military government till 1835. Even then the civil government established was a nominated and not an elective one. Self-government being out of the question in a penal settlement, Australia remained long in direct dependence on the crown. But the lesson taught by the American Revolution had nevertheless been effective. As the new colonies grew in population and importance, the opinion gained strength that both justice and expediency demanded that they should administer their own affairs. Even on commercial principles it was thought that colonial liberty was more profitable than colonial bondage. The doctrines of the political economists which became in the middle of the century the official creed of the English government, brought about the establishment of free trade (1846) and the repeal of what was left of the navigation acts (1849). Already before this the serious rebellion in Canada (1837) and Lord Durham's report, strongly recommending the establishment of responsible government, had called public attention to dangers of the existing system. The act of union of 1840, joining upper and lower Canada into one, introduced the principle of parliamentary self-government on the model of the British parliament. In the next decade the same "enfranchisement" was extended to the other provinces of British North America and to all the other colonies in a position to receive it, — to New Zealand (1852), to Cape Colony (1853), to Victoria (1854), to New South Wales and Tasmania (1855), to South Australia (1856), and to Queensland (1859).[1]

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[1] The rejection of the scheme of the Albany congress (1754), rejected by both mother country and colonies; the recognition by various colonial governors of insight, of the need of union and joint taxation; Governor Pownall's proposition of an imperial customs union — may be reckoned among the signs of the times.

It is interesting and instructive to observe the attitude adopted in England towards the colonies at the time of the grant of self-government, and in the period immediately following. In the first place two great questions of paramount interest in the colonial policy of the present day were left entirely out of sight, — the tariff relations of the colonies with the mother country, and the question of imperial defense. That the tariff should have passed unconsidered was entirely to be expected in the light of the ideas then prevalent; indeed the question seemed to have settled itself in the course of nature, and the optimistic free-traders of the middle of the century took it for granted that tariff barriers were soon destined to disappear the world over. It seemed unnecessary, therefore, to stipulate for free trade or any form of customs union between the United Kingdom and its dependencies. The other problem, that of imperial defense, was also passed over: perhaps by virtue of the very difficulty of its solution, perhaps as a result of the sanguine hopes that had been fostered in the peace era. The policy adopted was not everywhere approved. Disraeli, speaking in 1872, and foreseeing with characteristic prescience the difficulties that must arise, pronounced it a mistake. "Self-government," he said, "ought to have been conceded as part of a great policy of imperial consolidation. It ought to have been accompanied by an imperial tariff . . . and by a military code which should have precisely defined the means and the responsibilities by which the colonies should be defended, and by which, if necessary, this country should call for aid from the colonies themselves."

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[1] Lord Grey's treatise, *The Colonial Policy of Lord John Russell's Administration*, is a formal defense of the policy thus adopted. Natal was granted an elected legislature in 1856 and acquired responsible government in 1893.

But the real secret of the willingness of the English people to leave the government of the colonies in the hands of the colonists themselves lay in the new view that was becoming current as to the "manifest destiny" of the British colonies.[1] The example of the rise and progress of the United States seemed to point towards the inevitable future of all great dependencies inhabited by an enlightened and increasing population. Independence seemed only a question of time, and the duty of the mother country was to give the colonies a sound political education in the methods of responsible government, and when the destined hour came to let them depart in peace. The views of the "little Englanders," of the Manchester school of economists, averse to large military and naval expenditures, cosmopolitan in their sympathies and sanguine in their hopes of the commercial unity of the world, powerfully stimulated public feeling in this direction. It is astonishing at the present date to look back on the opinion then prevalent. Sir F. Rogers (afterwards Lord Blachford), who for eleven years was permanent under-secretary for the colonies (1860-71), wrote at a later date (1885) of the views he held in the following terms: "I had always believed, — and the belief has so far confirmed and consolidated itself, that I can hardly realize the possibility of any one seriously thinking the contrary — that the destiny of our colonies is independence: and that in this point of view the function of the Colonial Office is to secure that our connection, while it lasts, shall be as profitable to both parties, and our separation, when it comes, as amicable as possible." Such views were only too common in the period of colonial history from 1840 to 1880. Payne, in his "History of European Colonies" (1877), designed as an educational work for English schools, wrote: "Canada and Victoria are bound to England by a tie so slight that its rupture would not at all be dreaded; and such a rupture would hardly be felt whenever it happened." Great indeed is the contrast between such a point of view and the sentiments now entertained both in Great Britain and the colonies, of the relations of the dependencies to the mother country. But before considering the new imperialism and its political consequences, it will be best to pass briefly in review the varied systems of government at present obtaining in the colonial possessions of the United Kingdom.

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[1] For interesting details in this connection see B. Holland, *Imperium et Libertas* (1901).

7. Present British System of Colonial Administration. First let us consider the general principles which are adopted in the management of the British colonial possessions. Some persons indeed might deny that there are any general principles involved; for it is contrary to the spirit of British institutions to act on a formal and preconceived plan, and the method adopted is rather a habitual way of doing things, based on the teaching of experience, than a scientific and complete system of administration. The British system, if the word may be allowed, recognizes no absolute right of self-government. It aims, in the words of Earl Grey, to allow "the inhabitants to govern themselves when sufficiently civilized to do so with advantage" and, where this is not the case, to provide "a just and impartial administration of those colonies of which the population is too ignorant and unenlightened to manage its own affairs." It is recognized therefore that the government adopted in each colony must be in accord with the particular conditions presented, must vary according to the race, character, and number of the population, their degree of enlightenment, the extent of the territory, and (as in the case of Gibraltar) with the possible military importance of the place for the defense of the empire. Within these limits the principle obtains that a colonial community of which the great majority is made of civilized whites shall be granted the fullest autonomy; while to the other colonies shall be extended such a measure of self-government as their circumstances seem rightly to demand. The principle of political training for future self-government, as is seen in the case of the elected municipal bodies in India, is also recognized. In the case of every colony, however, the crown retains a certain power of control;

the governor, or executive head of the colony, sometimes nominal, sometimes actual, is the nominee of the crown; the crown reserves a veto on all colonial legislation; the final court of appeal for colonial cases is the judicial committee of the Privy Council.

Though resting on this general plan, the governments of the British colonies present the greatest range of diversity in the details of their political constitution. Various classifications have been offered, of which the most satisfactory seems to be the separation first of all into three great classes, — the crown colonies, the representative colonies, the responsible colonies. The crown colonies are those which have no self-government; the representative colonies are those which have partial self-government; the responsible colonies are those which have complete self-government. These three divisions may be taken to indicate, not only the classification of the dependencies at any particular time, but also the stages through which a British colony passes in the upward progress. Canada, as has been seen, was a crown colony from its conquest until 1791, a representative colony until the act of 1840, and since then a responsible colony.

In the first of these divisions, the crown colonies (with which also the various protectorates are to be included), are comprised all those dependencies whose governing officials are all nominated by the crown. The list includes the Straits Settlements, Hong Kong, Fiji, Trinidad, Sierra Leone, Honduras, Gibraltar, St. Helena, and many other places. Within the group, however, various degrees of dependence on the home government are found. In the places of great military and naval importance (Gibraltar, St. Helena) and in dependencies containing but few white people, the control of the crown is complete; the nominated officials are appointed directly by the home government, and sent out to the colony. In Gibraltar the whole legislative and executive authority is vested in the commander-in-chief, who is also governor. In other possessions, representing a higher stage of colonial evolution, and which contain a considerable element of white, or at least of educated native inhabitants, the control of the crown is less direct. In British Honduras, for example, the administration is conducted by a governor with a nominated executive council of five members, and a legislative council consisting of three ex-officio members and five others nominated by the crown from among the residents. The government of Hong Kong approaches still more nearly to being representative. The governor has as his executive council a nominated body of eight members, six of whom (the secretary, the officer commanding the troops, the treasurer, the attorney-general, the harbor master, and the director of public works) hold their positions ex officio. There is in addition a legislative council composed of the same ex-officio members together with the captain-superintendent of police and six unofficial members, — four appointed by the crown (two of these being Chinese), one nominated by the Chamber of Commerce, and one by the local justices of the peace. Such a body, it will be observed, stops just short of the principle of popular election. The details here given are not of importance in themselves, but are intended to show the careful grading of the British colonial government.

The representative colonies are those in whose government the principle of election has been introduced, without, however, being allowed to predominate. To this class belong Ceylon, Jamaica, Mauritius, the Bahamas, Barbados, British Guiana, Bermuda, etc. Here again two degrees of relative dependence may be distinguished. In some of them (as Mauritius and Jamaica) the legislature consists of a single body, a part of whose members are nominated and the rest elected; in others (as Barbados) the legislature consists of two houses, one entire house being elected by the people. But in all the representative systems, the officers of the executive are nominated, and the parliamentary system of government does not obtain. The legislature (Council of Government) of Mauritius, made up of the governor, eight ex-officio members, with nine nominated by the governor and ten elected members, is typical of the first class. Barbados illustrates the second and more advanced type; it has a bicameral legislature, the upper house (Legislative Council) composed of nine members nominated by the crown, and the lower, or House of Assembly (twenty-four members), being elected annually by the people.

At the apex of the system stand the really self-governing, the responsible colonies, whose governments are modeled on that of the United Kingdom itself. These include Canada, Newfoundland, Australia (now federated), New Zealand, the Cape of Good Hope, and Natal. Within this group, in accordance with the general terms of the agreement of May 31, 1902, between the crown and the Boers, still in arms, are to be included the Transvaal and the Orange River

Colony as soon as the progress of their pacification permits. The responsible colonies enjoy a virtual independence. Their governments have been created, as already seen in the case of Canada and Australia, by statutes of the British Parliament which are practically equivalent to written constitutions. With the exception of the nomination of the governor-general (or governor, as the case may be), the reservation of the power of disallowing colonial statutes, and the retention of the judicial committee of the Privy Council as the final court of appeal, the home government withdraws from any internal control of the self-governing colonies. It must however be distinctly understood that in point of law this self-effacement of the imperial government is only operative at the pleasure of Parliament. The claim has indeed been raised in Canada that the grant to the Dominion Parliament of "exclusive legislative authority" over the matters enumerated in the British North America Act was "exclusive" of the authority of the Imperial Parliament itself. Such a contention is at variance with the very basis of the British constitution, and cannot for a moment be accepted. But unless and until a statute of Parliament allows it, neither the crown nor any other authority in the mother country has any power over the colonies beyond that reserved in the constituent acts.

These colonies are thus left free to manage their own internal concerns. This includes the very important privilege of making their own tariff. All of the autonomous colonies have availed themselves of this, and have erected protective tariffs against the trade of the mother country. Though recently British goods have been admitted into Canada, New Zealand, and South Africa[1] at a preferential rate of duty, it was long true that the colonial tariffs placed British goods in the same position as those of a foreign country. The colonies have not the power to conclude treaties with foreign states, but it has been the custom of Great Britain, in negotiating treaties affecting immediately the greater colonies, to give a ready hearing to the wishes of her colonial subjects. "It is an understanding or even maxim of the policy governing the relations between England and the Canadian Dominion," wrote the late Sir John Bourinot, the leading authority on the government of Canada, "that Canadian representatives shall be chosen and clothed with all necessary authority by the Queen in council to arrange treaties immediately affecting Canada, and all such treaties must be ratified by the Canadian Parliament." The form of government prevalent in the responsible colonies is virtually the same as in England, except that the existence of the constituent statutes introduces everywhere the principle of constitutional limitations analogous to what is found in the United States. The governor exercises a nominal authority similar to that of the crown. The real executive is the prime minister and his cabinet, whose tenure of power is dependent upon the continued support of the majority of the lower house. The Canadian senate is a nominated body of limited members, but the nominations are made on the advice of the ministry, and not, as in the representative colonial councils, at the pleasure of the crown. The same is true of the legislative councils of Natal, New Zealand, and Newfoundland. The upper houses of Australia and Cape Colony are elective.

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[1] Preferential duties were adopted in 1903 by Cape Colony, Transvaal, Natal, Orange River, and Rhodesia.

India, whose conditions are altogether unique, stands apart from the rest of the British colonial system. Here a vast population, numbering in all about three hundred million and presenting the widest varieties of racial character, customs, and creeds, are more or less under the control of the United Kingdom. About seventy million of these are found in the semi-independent native states, the rest fall under the government of what is technically called British India. The government of India is divided between the home authorities, the central government in India, and the subordinate or provincial governments. At the head of the home government is the crown, acting through the secretary of state for India. With this secretary is adjoined a special council composed of former residents in India, holding office for ten years, and not eligible to sit in parliament. The expenditure of the Indian revenue must be sanctioned by the secretary and a majority of the council. All other business done in the United Kingdom in reference to India is conducted by means of the council, but in some matters of a diplomatic character, as in dealings with native states, the secretary acts alone. In India itself, the supreme executive power lies in the governor-general, or viceroy, who is appointed by the crown. He has an executive council, which includes the commander-in-chief and the highest officials. For legislative purposes, the council is increased by sixteen members appointed by the viceroy. The provincial governments, under governors (appointed by the crown) or lieutenant-governors (appointed by the governor-general) or chief commissioners (appointed by the governor-general in council) assisted by councils, are similar in construction to the central government. There is thus no attempt at self-government in either the central or provincial administration of British India. It is only in the municipal governments (by virtue of acts of Parliament, 1882 and 1884) that the elective principle has been introduced. Over the native states Britain exercises a varying degree of control. They contain no British officials, except an advisory resident; they raise their own armies. But they can hold no diplomatic intercourse with one another or with the outside world, and have no right to make war or peace. Britain also reserves the penalty of dethronement as a punitive power over the native princes.

8. Imperial Federation. The question of greatest interest in connection with the large self-governing colonies of Great Britain is their political future. Their rapidly increasing population and the development of their natural resources throw into a strong light the important position they are destined to hold in the course of the century now opening. The idea of their manifest destiny as independent states, prevalent fifty years ago, has now receded into the background. The new wave of imperialism that has affected public opinion in all the great states of the world has fascinated the national ambitions of all the British subjects with the possibility of the future power of their colossal empire. The smaller destiny of isolated independence is set aside in favor of participating in the plenitude of power possible in union. The combined efforts of

Britain and the colonies called forth by the Transvaal War have done much to strengthen this feeling. But with the acceptance of this new point of view, the troubled question of interimperial relations again looms large upon the horizon. The question is almost identical with the great colonial controversy of the eighteenth century already discussed. But the frame of mind in which it is approached on both sides, and the riper political experience now available, remove it to another plane. Yet it does not seem possible that another generation can go by and find Canada and Australia still outside of the imperial councils; it hardly seems possible that the group of ministers who control the foreign policy of the empire can permanently remain the appointees of the electorate of the British Isles, to the exclusion of the British dominions beyond the seas. If independence is no longer to be the future ideal of the colonies, and since geographical reasons forbid a complete amalgamation, it looks as if the manifest destiny of the colonial system must now be sought in imperial federation. The movement that has been made in that direction has enlisted the support of influential men in all parts of the empire; but as yet they are only a minority. It seems, nevertheless, as if the continued growth of the colonies, and the more and more imperative needs of imperial defense, will force the question to the front. The difficulty to be overcome is great. If a federal parliament is formed, it obviously will not exercise authority over the internal affairs of the British Isles. There must therefore be two parliaments in Great Britain itself, the insular parliament and the supreme federal body. It will not therefore be sufficient to admit colonial representatives to the parliament at Westminster, but will be necessary to totally reconstruct the legislative power in the United Kingdom. The dead weight of inertia to be encountered, before such a change can be effected, will be realized by all who are aquainted with the British political temperament.

9. Recent Colonial Expansion of European States. But it is now necessary to turn to the consideration of the colonial expansion in recent times of the other great states of Europe, and the methods they have adopted in the administration of their dependencies. Since the year 1880 the territorial area claimed by the great powers as their dependencies has vastly increased. The available parts of Asia, and the unclaimed islands of the Pacific have fallen into European hands; the largest prey has been found in the continent of Africa, which has practically been parceled out among the great states. France, which had commenced the conquest of Algiers as early as 1830, has extended its possessions in north Africa, and holds not only all Algeria, but Tunis, French West Africa, the Sahara, Wadai, Sénégal, French Guinea, the Ivory Coast, Dahomey, and French Congo. This territory includes nearly all of the desert, the larger part of the valley of the Niger, and central Africa north of the Congo. The island of Madagascar was seized in 1895. France has also (beginning in 1861) obtained a large part of Indo-China (forming the dependencies of Cochin China, Tonkin, Annam, and Cambodia). The French dependencies now include in all an area of 3,740,000 square miles, and a population of 56,000,000 people. As the larger part of this area is occupied by an uncivilized native population (in Madagascar, for example, there are less than two thousand Frenchmen in a population of two and a quarter millions), it has remained to a great extent either under military government (as in central Africa) or under appointed officials with military support (Madagascar, Indo-China). Where possible, however, in the older colonies of France, self-government is introduced; Martinique and Guadaloupe have each elected councils; so too has New Caledonia in the south Pacific. Algeria is governed as part of France, being divided into departments and represented in the Senate and in the Chamber of Deputies. Nowhere has more thought been directed to the theory of colonial government than in France, the largest part of the theoretical literature of recent times on the subject being French. In spite of the fact that the maintenance of the new colonial system proves a heavy burden on the French exchequer, the dream of a colonial empire persists. It is characteristic of the French people, that while the English still keep their vast colonial possessions unrepresented in the parliament of the mother country, France has already adopted the principle of colonial representation. Cochin China, French India (Pondicherry and four other towns), Guiana, and Sénégal each elect one deputy; Guadaloupe, Martinique, and Réunion each elect two. These last three, as well as French India, are represented by one senator each.

The expansion of Germany, which began in 1884, has taken the form of establishing "protectorates" and "spheres of influence," rather than colonial establishments in the true sense. The territory thus brought into dependence on the German empire amounts to one million square miles. Most of it is in Africa, and is made up of Togoland, the Cameroons, German Southwest Africa, German East Africa, etc. The administration carried on by imperial governors, commissioners, secretaries, etc., is similar to that of a British crown colony of the primary type. There is scarcely any European population. Italy also has established African dependencies (Eritrea, Italian Somali Land) whose general character and whose administration are similar to those of Germany. The colonial possessions of the Netherlands, though not attributable to the recent European expansion, are of great wealth and importance. Their population outnumbers that of the mother country in the ratio of seven to one, although of the thirty-five million inhabitants less than one hundred thousand are white. The elective principle is nowhere in use. The governor of the Dutch East Indies, the members of his assistant council, and the provincial "residents" and district "controllers" are all appointed officials. The administration of the colony, however, must be in accord with the principles laid down in a Dutch statute of 1854, for the "government of Netherlands India."

10. The Dependencies of the United States. The most recent chapter in the history of colonial expansion is offered by the acquisition on the part of the United States of a number of dependent territories. The Hawaiian Islands, annexed in 1898, may be passed over; admitted to territorial status (1900) and having a government similar to that of the other territories of the United States, they are not to be looked upon as a dependency. But the case is different with the islands acquired by cession from Spain (1898), as the result of the Spanish-American War (Porto Rico, the Philippines, Guam), and with Tutuila, Manua, etc., in the Samoan group, annexed in 1899 at the request of their inhabitants. Porto Rico is controlled by a governor and an executive council appointed by the President of the United States, and a legislature of which the lower house is elected by the people, while the upper house consists of the executive council. Of this branch of the legislature at least five, out of a total of eleven, must be natives of the island. The principle here adopted of forming a legislative body by using an executive council containing a number of natives, resembles somewhat the system already described as used in the government of British India. The addition of a lower house altogether elected makes the government much more nearly democratic than that of India, and assimilates it very closely with the government of Barbados. The government of the Philippine Islands has not yet passed the constructive stage. For some time after the defeat of Spain, and even after the formal cession of the islands, the administration remained in the hands of the military authorities. This was superseded by civil government (July 1, 1901) vested in a commission of officials nominated by the President. An act of Congress (July, 1902) validated the creation of the civil government thus established, and the exercise of power granted to it by executive order. The commission thus formed consists of a governor with seven commissioners, four being Americans and three Filipinos. The American commissioners are respectively assigned to the departments of commerce and police, finance and justice, public instruction, and the interior. The same act of Congress provides for the future government of the Philippines. Two years after the completion of a census and the pacification of the islands, a new government will be formed in which the commission will remain as the executive, but will in part lose its legislative functions. There will be a bicameral legislature of which the commission will form the upper house, the lower house (Philippine Assembly) to consist of delegates elected from all of the people except the non-Christian tribes.

The acquisition of the above dependencies by the United States has occasioned in recent years a vast amount of discussion. It has been a matter of earnest debate as to whether the acquisition of such distant insular territory as the Philippines, peopled by races altogether alien, in part uncivilized, and in part openly hostile, was either just or profitable. Even the constitutionality of such a proceeding was widely denied. The last question has been set at rest by the interpretation of the courts, and by the overwhelming force of accomplished fact. The plain truth is that at the making of the Constitution, the acquisition of such territory as the Philippines was not considered, either one way or the other. The result is that in reality the Constitution has nothing to say about it. But the convenient doctrine of implied powers has been made to meet the case. The question involving the keenest discussion was that of the tariff. It was held by many that the provision of the Constitution that the tariff must be uniform throughout the United States prevented Congress from making a tariff barrier between the republic and its new dependencies. The Supreme Court, however, in the Insular Cases of 1901, has decided that this is not the case. In consequence the action of Congress in setting up the present tariff[1] is constitutional.

It may be observed in conclusion, that the tendency of the United States in dealing with its dependencies has been to proceed further in the direction of popular government than English experience would warrant. The system contemplated in the Philippines of instituting a lower house elected by the natives, would meet with no approval if suggested for the governance of British India. It has been difficult for Americans, in whose minds the principle of popular government has always assumed a more sharply theoretical form than is current with the English, to reconcile themselves to the "possession" of a dependent community. Common sense has shown the impossibility of governing the Philippine Islands on the same plan as Massachusetts or California. Yet the positive assertion of the Declaration of Independence that "all men are created equal" reads a little awkwardly in connection with the government of a group of islands by a commission sent to them from a distant country, and with the exclusion of the unchristian tribes from its future governance. But as usual the brute force of circumstances proves too strong for abstract theory, even when clothed with the historic authority of the Declaration of Independence.

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[1] The tariff as between the United States and Porto Rico was temporary and has expired. An act of Congress of March 8, 1902, set up a tariff as between the Philippines and the United States and conversely. Products of the islands enter the United States at twenty-five per cent less than the tariff rate applied to foreign countries. The proceeds are expended on the islands.

The islands have come, by the fortunes of a just war, into the possession of the United States. It has become a moral duty to govern them, and only an infatuated worship of political abstractions could counsel handing them over to the wrangling anarchy of their half-civilized inhabitants.

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CHAPTER VII

LOCAL GOVERNMENT

1. Local and Central Government Distinguished. — 2. Areas of Local Government; the United States, France, England. — 3. Composition and Powers of Local Governing Bodies; the United States. — 4. England. — 5. France. — 6. Prussia. — 7. Local Taxation; the property tax of the United States. — 8. Systems of Local Taxation in Other Countries. — 9. Reform of the American System.

1. Local and Central Government Distinguished. Hitherto, our discussion of the structure of government has been confined to the consideration of those governing bodies whose authority extends over the whole state. But in all but the very smallest communities these are not the sole organs of administration. There exists in addition a number of officials and official bodies, whose functions extend only over a portion of the total territorial area of the state. These bodies, and the duties that they perform, are spoken of under the general designation of local government. Local government, therefore, will refer to the operations of all township and county councils, the governing bodies of municipalities, districts, etc. The common-sense meaning of the term is quite clear, but the definition of local and central government, in exact, precise form, is not so easy. For it is to be observed that not all the governing bodies whose power extends only to a part of the state are to be classed as organs of local government; for otherwise this would include the component parts of a federal state, which is contrary to the evident signification intended. The state authorities of New York or Massachusetts are not organs of local government. Nor does the distinction lie in the extent of territory covered, nor in the number of persons ruled over. The municipal government of New York or Boston, or the county council of Lancashire, exercises its authority over a vastly greater number of people than the state of Nevada; on the other hand in extent of territory, the senates of Hamburg and Bremen, which are not merely local governments, rule over less territory than comes within the sphere of the council-general of a French department. The difference between local and central government is not therefore a matter of area or of population.

The distinction lies partly in their relative constitutional positions, and partly in the respective nature of the public services performed. In regard to the first point, it is true of most independent states that the local government derives its powers from the central government, and holds them at the pleasure of the latter. This is the case, whether or not there is a written constitution. In France and in Italy, each of which has a written constitution, the organization of the local government is entirely under the control of the central parliament. It is for this reason that we do not think of the Swiss cantons or the "states" of the United States as organs of local government; for these component parts of a federal system are, within the sphere of their own competence, quite independent of the central federal authority. But the distinction thus made is not universally true. Though it applies to nearly all independent states, it is not the case with the organs of local government (townships, county, and municipal authorities) in the separate commonwealths of the United States. These certainly are organs of local government, and yet to a great extent they exist by virtue of the state constitution, and could not be put out of existence at the will of the state legislature.

The other point of distinction between local and central government consists in the different nature of the services accomplished. This requires some further explanation. The various functions performed by the agencies of the state for the benefit of the citizens will roughly fall into two classes. Some of them will be in the interest of the community generally, and the benefit thereby effected will not be assignable to any single part of the country. For example, the protection afforded by the army and navy whereby foreign conquest is prevented, is a benefit shared by all the inhabitants alike. The same will be true of all the large class of public works, the advantage and purpose of which may be said to be national. There will also be a number of regulative functions to be performed,—the institution of the criminal law, the control of marriage and divorce, law regulating contracts, sales, etc., all of which, to be effective, must be uniform. The whole class of functions thus indicated will properly fall within the province of the central government. But in addition to these, there are other state activities (for it must be recollected that both local and central government form a part of the organization of the state) of quite a different character. Here the benefit to be conferred only affects a small portion of the community, and is obviously assignable to a particular area. The lighting of a town, the erection of a bridge over a country road, the establishment of a street-car system, are matters of this sort. Here it seems reasonable that the advantage, the cost, and the control of the enterprise should be looked upon as solely the concern of those who are affected by it.

Such, then, is the general distinction between the duties of central and local governments. The public services of the latter will be found on examination to refer mainly to the maintenance of schools, hospitals, asylums, bridges, roads, parks, etc., and the management of local public utilities, such as lighting plants, transportation systems. The activities of local government are thus concerned mainly with real property in various forms; it represents the collective activity of the citizens directed towards the creation and control of such tangible utilities (roads, bridges, water supply) as are of general benefit in their particular area, and indivisible among the separate citizens. The services thus performed may be better understood by contrasting them with such regulative legislative activities as the making of the criminal law, which belongs to the central government. In spite, however, of the obvious nature of the general distinction, the functions of local and central government shade and blend into one another. In some cases what is evidently a local matter as to expense and immediate benefit, is yet in other aspects a matter of general concern. This is seen in the case of schools. It is of evident universal concern that all the citizens should be educated, and it is therefore within the proper province of the central government to make education compulsory, and to prescribe the general plan upon which it shall be based. It may also properly defray a part of the cost, leaving to the local government the immediate control and the main part of the cost, at least of primary schools.

2. Areas of Local Government; the United States, France, England. From this general consideration of the nature of local government, we may pass to some of the special problems which arise in its construction and conduct. These we may group under three heads: (1) the question of local areas, and here we shall have occasion to contrast the orderly "multiple system" in use in the United States with the confusion of the English areas; (2) the composition of local governing bodies, and their relation to the central executive, in connection with which the centralized system of France may be compared with the decentralization in England and in America; (3) the question of local taxation, involving an examination of the American property tax, and the systems in use in other places.

The institution of local government everywhere necessitates the division of the total territory, not only into one set of subordinate areas, but into several. In the United States we have townships and counties; in England parishes, districts, and counties (with other divisions); in France, communes, cantons, arrondissements, and départements. In the United States and in England we have in addition to these the municipal areas occupied by town and city governments. The reason for having more than one set of divisions will be plain. Different public utilities will naturally spread their effect over areas of different size. Thus it will require, let us say, only twenty families to support a country school; but the same number of families could not with advantage erect and maintain a lunatic asylum for their use. Nor presumably could a hospital or a poorhouse be supported out of so small an area. It becomes plain, then, that local government demands the making of several areas adapted to the respective "rarity" or "denseness" of the function to be performed. But for convenience' sake it will be well to make these areas as few as may be, and to group together those which roughly correspond.

As the basis of the areas of local government, there will generally be found in old countries such as England, France, or Prussia, a primitive unit of settlement whose history is long antecedent to that of the central government itself. Such is the English parish, whose ecclesiastical name has susperseded the original Saxon "township," the French commune, and the Prussian gemeinde. In its origin this represents the little community of neighbors living together in a hamlet, or in adjacent rural settlements, and conducting their joint concerns by some form of common management. Where such exists it is plainly desirable to adopt it as the primary area of the local government of the modern state. There is, however, this disadvantage, that in the course of their long history the original parishes, etc., will have grown vastly different in size and population. In England, for example, out of a total of about 15,000 parishes, the smallest contains less than fifty acres, the largest over 10,000; eleven parishes (in 1891) had no inhabitants, and the most populous (Islington) contained 319,000 inhabitants. Similarly in France some communes are rural areas or mere hamlets, while others are great cities. In spite of the distortion of area thus occasioned, it is advisable to retain such historic areas in the frame of local government. For they represent an essentially organic unit, and one which offers already a common economic and social life as a basis for political construction. Above such areas as these will come larger units (the counties, districts, etc.) representing the performance of public duties such as road-making, erection of poorhouses, hospitals, jails, etc., which demand a wider support than that given by the smallest local community. The number of gradations in the ascending scale of local areas varies from country to country, and will be best understood by a brief comparative review of the division adopted in some leading states.

The United States is singularly fortunate in the configuration of its local areas. They are in part historic, and in part deliberately constructed prior to, or at the same time as, the settlement of the land. The towns (townships) of Massachusetts, for instance, and the counties of Virginia may be called historic or organic areas. They represent the original grouping of settlers in their first occupancy of the colony. But one has only to glance at the map of such a state as North Dakota or Kansas to see that here the form of the local area has been a matter of deliberate construction. The townships, the sections into which they are divided, and the counties of which they form a part, are rectangular figures constructed on a common plan. But in the greater number of the commonwealths in the United States, whether in regular lines or not, we find each commonwealth divided into townships, which grouped together make up counties. In some states, as in New England, the townships have come first, and the county is made up by a subsequent addition of townships; in the South the reverse has been the case, and the original area was the county, subdivided later to make townships. In the newer states, townships and counties have been made at the same time. But the excellence of the arrangement of the areas of local government in the United States lies in the fact that the larger areas are multiples of the smaller ones; township lines do not cross county lines. The result is that all the inhabitants of any township belong to the same county. This will be seen to have a most important bearing on the adjustment of local financial burdens.

The division of areas in France is based, as in the United States, on the multiple plan. To this general scheme, however, the historic commune is a disturbing exception. There may be several communes in an arrondissement (as is generally the case, since the total communes number 36,000), or, as in the case of Paris, several arrondissements in a commune. But above the commune the areas fit into one another; the canton (which is only an electoral and judicial district, and not a seat of government) is in every case a part of an arrondissement; the latter itself is a subdivision of the largest area, the département. With the exception again of the commune, all these areas represent deliberate construction, involving to some extent the sacrifice of the historic division of the country. They were made in 1790 by the Constituent Assembly, the first national parliament of the French Revolutionary era. This is reflected in the fact that the departments are approximately of equal size. Some of the more extreme constructionists of the epoch wished to subdivide France into a number of rectangles, exactly similar and exactly equal, disregarding at the same time the geographical configuration of the country and the historic associations of provinces, towns, and districts. This was not done, however, and the departments as constructed conform pretty much to the physical features of the country, and are named after the mountains, rivers, bays, etc., which they contain or adjoin.

In England, and indeed in the British Isles generally, the utter confusion into which the areas of local government had fallen has caused one of the administrative problems of the nineteenth century. In Saxon times the township, the hundred, and the shire formed a simple multiple system with local self-governing bodies. But the hundred fell into decay, the township (taking its ecclesiastical name of parish) became irregular, and lost most of its civil authority, and in place of the local self-government of township and county was substituted first the control of the king's sheriff, and finally the almost universal administrative jurisdiction of the local justices of the peace. For special purposes — the care of the poor, highways, burial, sanitation, schools — special areas were added, having little to do with parish or county lines, and under a separate governing body. The result previous to the reforms to be described later was complete confusion. The situation is thus described by Dr. William Odgers, recorder of Winchester:[1] "In 1883 England and Wales were divided for local-government purposes into the following areas: There were 52 counties, 239 municipal boroughs, 70 improvement-act districts, 1006 urban sanitary districts, 41 port sanitary authorities and 577 rural sanitary districts, 2051 school board districts, 649 unions, 194 lighting and watching districts, 14,946 poor-law parishes, 5064 highway parishes, not included in urban or highway districts, and about 13,000 ecclesiastical parishes. The total number of local authorities who then taxed the English rate-payer was 27,069, and they taxed him by means of 18 different rates." With one trifling exception, "all the various areas intersected and overlapped each other." The means that have recently been taken to rectify the entanglement thus occasioned will form the subject of a later paragraph.

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[1] *Local Government*, 1901; an excellent book, which, however, refers only to local government in England.

3. Composition and Powers of Local Governing Bodies; the United States. Let us now consider the composition and powers of local governing bodies, and their relation to the central authority. Here we may distinguish two broadly contrasted methods of construction. The one is the system of decentralization, or local autonomy. By this the control of local affairs is vested in a set of officials, elected by the people of the locality itself. Subject to certain general regulations which proceed either from the central authority or from the constituent power (expressed in a written constitution) which is behind both the central and the local organization, the fullest latitude is given to the citizens of the locality in the management of their public affairs. The other system is that of centralization. Here the management of local affairs is largely controlled by a set of officials appointed by the central government. The former system prevails in complete form in the United States, and to a slightly less degree in England. The latter, or centralized system, is in use in France. In the kingdom of Prussia, something of a combination of the two has been put into practice. A brief review of the governing bodies thus established in the different countries will help us to a judgment as to the peculiar political purposes and the relative merits of the two systems.

In the United States, both in the North and South and in the new states, local autonomy prevails. The form which it assumes differs, however, to some extent. In the New England states the primary area of local government is the historic "town" or township, originally formed by the joint settlement of a group of emigrants. Its government has already been referred to in connection with direct legislation in a preceding chapter. The original organ of its government is the mass meeting of the qualified voters, called the town meeting. In places that have grown too populous for such a form of government, the town meeting is replaced by elected municipal government, — in Massachusetts, for example, towns of over twelve thousand inhabitants are erected into municipalities. But in less populous areas, the town meeting still exists. It is held once a year (with extra sessions, if necessary), usually in the spring, though in Connecticut the regular meeting is in the autumn. Its business is to elect the officers of the township for the ensuing year, to vote on the prospective expenditure of money, and the basis of its assessment, and other local matters that may be brought before it. When the town meeting is not in session, its authority passes to the officers whom it has elected. These are the group of selectmen, varying from three to nine in number; the town clerk, who keeps its records; the treasurer and the assessors, who are entrusted with the important duty of setting a value on the property of the township for the collection of taxes; in addition to these are a collector of taxes, school-committee men, and minor officers. This system, it will be seen, erects the township into a complete local democracy, a republic within a republic, as it were. The authority of the superior officials of the state over the affairs of the township is reduced to a minimum. It must be recollected, of course, that under the American system, the state constitution itself acts as a check upon the power of the local authorities, prescribing the limits of their authority, often laying down the maximum of their taxing power, and the form of taxation which they are authorized to use. If they exceed their legitimate powers, the usual method of judicial redress through the courts can be brought into play. The area superior to this, the county, is in New England merely a grouping of townships, whose governing authority is an elected body, the functions of which are very restricted. In Massachusetts there are three commissioners, one elected each year, and serving for three years. Their duties consist in apportioning taxes for county purposes among the towns according to the system discussed later, in erecting and looking after county buildings, and maintaining county roads, in issuing licenses, etc.

In the South the position of county and town is reversed. The county is the historic area, originally used for judicial purposes, and extended in use, later, to other administrative functions. The township represents a subsequent subdivision of the county, especially for the purpose of maintaining primary schools. But in some states the county exists alone, without the township. The organization of the Southern county is based on local autonomy. At its head is the elected board of county commissioners, with whom are associated a treasurer, superintendents of the poor and of education, sheriff, and other officers. Where no township exists, the commissioners of the county conduct the whole local administration (roads, poorhouses, jails, etc.); where the township has been introduced, the things handed over to its elected officers vary very much.

In the central Atlantic states, and to the west of the Alleghanies, we no longer find either township or county assuming the same preponderant position as in New England or the South. Both township and county exist, governed by officers elected by the people, and dividing the local government between them according to the nature of the service to be performed. Sometimes the one and sometimes the other has been historically antecedent. In New York, Pennsylvania, Delaware, and New Jersey, the township was the original area, an organic unit based on settlement. For this reason we still find the annual town meeting in rural New York, presided over by the justice of the peace, electing officers, passing by-laws, and voting taxes. But in the central Atlantic states the existence of a larger and artificial area in the shape of the "riding," acted as the starting-point for the introduction of county government. In the northwestern states the county has generally preceded the township. In Illinois, most of whose Southern settlers in early times came from Virginia, the county was first introduced. But here, as in a great many other states, the needs of school regulation served to introduce township government. By the system of surveys made by authority of Congress (beginning with the land ordinance of 1785), the land in all new territory has been cut up into squares six miles each way, and thus containing thirty-six square miles. One square mile in each has been devoted by the national government to the maintenance of public schools. It has thus happened that in many cases the word "township" was first used merely as the designation of the tract of land six miles square. Later on, as settlement grew, the election of officers for the public business of the township naturally followed. But in other states the township, though the county has existed side by side with it, has been from the first the chief area of local government. This has happened in Michigan, whose first settlers came from New England, and transplanted their local institutions. The town meeting is in use in Michigan almost in the same way as in Massachusetts. Within the township itself there is often found as a subordinate area the school district, with separate elected officers (trustees, directors, etc.), who appoint teachers, supervise the expenditure of money on buildings, etc. But this is not universal, as in many places — in Massachusetts and Pennsylvania, for example — the school district is amalgamated with the township.

The above are the only organs of government that operate in the rural parts of the country. But there are, in addition to these, the urban organizations (cities, towns, villages, and — in Pennsylvania — boroughs); the exact form of government varies from state to state. Cities and towns, etc., are sometimes organized by virtue of a general statute or constitutional provision, which makes it possible for any locality having a certain population to adopt a municipal government. Sometimes their form of administration is given to them by a special act of the legislature. It may approximately be said that the latter is the case in regard to the larger cities, the smaller ones coming under a general law. In all cases the government is democratic and autonomous. The control of the city is in the hands of officers elected by the qualified voters among its inhabitants, or, if not directly elected, at any rate appointed by some one else who is himself elected. In some states (Virginia) the city government excludes the county; in others the county remains, forming a part of the city, or including the city as part of itself. The government of an American city resembles in its structure that of one of the states. At its head is an elected mayor, as chief executive officer, with a large number of subordinates, partly elected, partly appointed. There is, in addition, a legislative or quasi-legislative body in the form of the city council, generally made up of two different sets of members — the aldermen and the councilors — who are elected for different terms and different districts. The earlier tendency, which originated in the prevalent belief in the omniscience of any legislative body and a distrust of executive officers, was to place the bulk of the authority in the hands of the council, and to give the mayor as little discretionary power as possible. The change of public opinion in this respect (already referred to in a preceding chapter) has caused a contrary policy. The concentration of authority in the hands of one man, rather than of a whole body, carries with it a definite location of responsibility. One man, conspicuous by the isolation of his office, aware that he alone is answerable, and that the blame of negligence cannot be shifted, and having at the same time the power to act unhampered by idle discussion, is more likely to prove efficient than a committee whose members can shift to one another's shoulders the blame of their joint misdeeds. In Boston, for example, the administration is vested in a mayor elected for two years, and in a city council composed of two houses, — an upper house of thirteen aldermen, and a lower house of seventy-five councilmen. Of the subordinate officials, the street commissioners are the only ones elected by the people. Some few of the rest are appointed by the council, and the police board by the government of Massachusetts, but the great bulk of appointments to city offices are made by the mayor. In some cases the ratification of the aldermen is required. By the charter of greater New York, amended in 1901, the city government centres in a mayor, elected for two years, and a board of seventy-three aldermen, elected for the same term. The mayor has very great power. He can absolutely veto any grant of a city franchise, and has a partial veto over ordinary legislative acts of the board of aldermen. He appoints the heads of fourteen out of the fifteen administrative departments (fire, education, water supply, etc.), and has power to remove most of them. He appoints, also, the civil service commissioners. Each of the separate boroughs of greater New York has its president, who controls the street paving, the sewers, etc.[1]

The most important of all questions in connection with city government is not its construction but the scope of its operation, the kind of public services which it is to undertake, whether or not it shall operate its own lighting plant, car service, etc. But the consideration of this topic will fall under a later chapter.

4. England. The distinctive feature of American local government has been seen to be the great extent to which autonomy, or self-government, prevails. The same feature is to be observed in the local government of England, as recently reconstructed; but previous to the reconstruction acts of the last half of the nineteenth century, this was not the case. The greater part of local jurisdiction had been placed, not all at once but bit by bit, in the hands of the justices of the peace. The functions of these officials had become so numerous as to defy anything but a purely alphabetical enumeration; they included such important matters as the levy of the county rate, the issuing of liquor licenses, the conduct of asylums, and the supervision of prisons. In their judicial capacity these officials tried criminal cases. The justice of the peace, appointed by the crown, on the advice of the lord lieutenant of the county, did not represent the principle of local self-government. He was the nominee of the central government, and in many cases was acting as the agent of one of its departments, of the local government board, the board of trade, etc. In addition to the justices, various special bodies had been created in the course of the nineteenth century, occupying some of the conflicting areas already mentioned. The board of guardians (by the poor law amendment act of 1834) had control of the care of the poor in a "union" of parishes, the board being composed of the local justices together with elected members. The burial acts (1852 and others) constituted burial boards, elective bodies operative over a parish or larger districts. Finally there were added, in 1870, school districts, with elective school boards. The parish itself remained as an ecclesiastical area, but exercised also through its officials, or through its general vestry meeting, minor civil functions. These and other bodies made up a medley of authorities, whose areas of jurisdiction were inextricably confused, and whose composition gave but little scope to local self-governance. The government of cities and towns which had grown up under special charters, and was often in the hands of a small portion of the inhabitants (sometimes of a close corporation), was also hopelessly confused and hopelessly at variance with any principle of popular government.

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[1] D. B. Eaton's *Government of Municipalities* is a standard work upon the subject of city government.

Though much of the older confusion, at least as viewed by an American, remains, a great deal has been done to place local government in England upon a more reputable footing. Two main objects have been kept in view, — the rectification of areas and the introduction of local self-government. With this object, a series of reforming acts has been passed: the municipal corporation acts of 1835 and 1882, the local government act of 1888 (referring mainly to county government), the local government act of 1894 (for parishes and districts), the London government act of 1899, and the education act of 1902. The general effect of the reform is as follows. The justice of the peace is relegated to his judicial sphere, retaining but few of his administrative functions. The old Saxon system of three ascending areas with elective self-government (township, hundred, and county) reappears in the present parish, district, and county. To the county is given an elected council, with wide range of local power. The elected district council has authority over sanitation, allotments, certain licenses, and other things. The parishes inside the area of towns are not affected by the reform, but the rural parishes have now elective self-government. If the parish has less than three hundred inhabitants, it exercises its government by means of a general "parish meeting," on the lines of the American town meeting, but with much less authority, for the sphere of parish operations is small. In the larger parishes councils are elected. The school district under the act of 1902 disappears, and the control of schools is vested in a committee of the county council, having as a subordinate authority a body of managers for each school.[1] The reforms also introduce elective self-government into the cities and towns, in the shape of mayor, aldermen, and councilors; but the relation of the cities to the counties in which they lie is not always the same. Some are administrative counties (Southampton, etc.), or are "county boroughs" (Liverpool, Manchester, and about sixty others), and stand quite apart from the county government. Below these are graded classes, which fall to an increasing extent within the regulation of the county authorities. London stands by itself. It contains within it the small central portion (about one mile square) known as the city of London, and governed as before by the lord mayor and the "courts" of which he is president, the court of common council (composed of aldermen and councilors) being the chief. Outside of this lies the vast "county of London" (with a population of 4,433,000 in the census of 1896), under the control of an elected county council. This whole area (except the city) is subdivided into twenty-eight "metropolitan boroughs," each with an elected council. The result of these various reforms is that throughout the whole system the central government has withdrawn from its former control, in favor of the autonomy of elected local authorities. Such management as it still retains is in the hands of the local government board, a body consisting of a president (who is a member of the cabinet, and who is the acting power) and other cabinet officers, nominally associated with him. But the duties of the board consist merely in supervision; it does not appoint local officials, and its chief function of importance is to sanction financial measures of the subordinate authorities.

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[1] The violent opposition to the act arose not from this aspect of its provisions, but from the fact that, in unifying the church schools with the board schools, it contrived to allow the former to get a share of the proceeds of local taxation. It amounted therefore, in the eyes of its adversaries, to a device for making rate-payers of all denominations contribute to the support of the schools of the Church of England.

5. **France.** In France local government assumes

an entirely different character from that found in America and England. The distinguishing feature is its highly centralized form, and the great degree of dependence in which all local authorities are placed in regard to the central national government. Take for instance the administration of a French department, the largest of the local areas. At its head is the prefect, an official appointed by the president of the republic, on the recommendation of the minister of the interior. He has associated with him, it is true, an elected body known as the general council of the department. But the power of the latter is reduced to the smallest compass. It is allowed by law only two regular annual sessions, the one of fifteen days, the other of a month. It has no true taxing power, for the amount of money which it may use and the manner of raising it are both regulated by the French parliament. In the spending of the money thus accruing to it, it does not act on its own initiative, for it is the prefect who draws up the budget which is annually submitted to it. Even then the expenditure as finally voted requires the assent of the president of the republic. The latter has also the power to dissolve the council, a power which may be exercised even by the prefect if the council outsits its statutory term. If it exceeds the scope of its legal competence, its acts can be declared void by the president. Its members are unpaid, their attendance is compulsory, they are forbidden to adopt any resolutions, etc., bearing upon general politics, nor can a council enter into any political correspondence or relations with that of any other department. In contrast to this the power of the prefect is very great. At times, indeed, he merely acts as the agent of the general government, with no discretion of his own, as when enacting the ordinances of the president. But in addition to this, and to the duties in connection with the council already explained, the prefect has a wide sphere of authority. He appoints and dismisses the teachers in the government schools, is at the head of the police, is recruiting officer, etc. The same system on a smaller scale is adopted in the arrondissement, the first subdivision of the department. At its head is a sub-prefect, appointed by the president; the functions of its council amount to little more than the division of apportioned taxes among the communes. The primary unit, the commune, is in a slightly less dependent position. Being organic and historic, and not merely "geometrical," as are the superior units, it tends to develop a greater vitality. Its mayor (since 1882) is an elected officer. But its municipal council, like that of the department, has restricted powers and very limited sessions.[1] It is subject to dissolution by the president, and can be suspended for a month by the prefect. All French towns and cities except Paris and Lyons, which have a special form of government, are organized as communes on the same plan.

The peculiar form which local government has thus assumed in France has grown out of the troubled history of the country since the Revolution. At the making of the first constitution of that era (the monarchical constitution adopted in 1791) the reformers were fully inspired with the idea of local autonomy. The departments were erected into what were described as "little republics," and the power centred in their "councils general" was very considerable. Such an arrangement made at such a time served only to weaken the authority of the central executive at Paris to an alarming degree. Under the revolutionary government of the Terrorists, therefore, in 1793–94, local power was put into the hands of "national agents," appointed from Paris, and of special "representatives on mission," who exercised a dictatorial power. The intense centralization thus effected rendered it possible for the executive government to avail themselves of the whole resources of the nation with wonderful effect. The same plan was deliberately adopted and perfected by Bonaparte under the constitution of the year VIII (law of Feb. 17, 1800), in which the prefects and sub-prefects appear, and which has since remained as the basis of local government in France. The struggle between different dynasties and parties for the control of the national government, and the successive revolutions (1830, 1848, 1851, 1870) in which the struggle has culminated, have made each party willing to adopt the centralized system as a means of consolidating its own power. This has contributed largely to give to Paris a political preëminence not enjoyed by any other capital. For the purposes of revolution, Paris during the nineteenth century meant France, and the successful seizure of the central control carried with it the mastery of the entire government. The efficiency of this concentration of power in time of war or invasion is very great; it insures a prompt coöperation from all parts of the country. But as against this must be set the enervating influence on local affairs of government from above, and the temptation of the central government to use its agents for political purposes.

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[1] Full details in reference to the organization of local government in France may be found in Ducrocq, *Cours de Droit Administratif*, vol. i; and in Simonet, *Traité Elémentaire du Droit Public et Administratif.*

6. Prussia. The system of local government in Prussia is far too complex to allow of any adequate description in brief compass. The areas are numerous (provinces, districts, circles, communes, and organized towns). It contains, however, one interesting feature, which may be noticed in passing. As a compromise between state control and local self-government, there is in use in the Prussian provinces a double set of officials, a president and council appointed by the crown, and a provincial diet elected by the representative bodies in the circles and choosing its own executive head (Landeshauptmann) and executive committee. The spheres of state authorities and provincial elective authorities are kept separate, the former being mainly concerned with supplying information to, and acting as the agent of, the royal government at Berlin. The functionaries of the Prussian district are all nominated by the central government; of those of the circle, the executive chief is appointed by the president of the province, the diet is elective. In rural communes there are elective assemblies, but there remain still communes, if one may use the term to translate the word *Rittergut*, that are under the jurisdiction of a manorial lord. The towns and cities are variously organized on the elective plan. But it must be recalled that the elective system in Prussia is always arranged on the division of classes described in an earlier chapter. The central government retains a supervising power over financial measures. The Prussian system of combining local authority with central control would prove quite impossible in America, owing to the conflict of jurisdiction it would occasion; in Prussia such conflict is less to be feared, because it is a matter controlled, as already explained in reference to France, by the administrative officers themselves.

7. Local Taxation; the Property Tax of the United States. We come now finally to the difficult question of local taxation and finance. In the United States local taxation has proved one of the most serious of the practical problems of administration. The peculiar difficulty which has arisen to a greater or less degree all over the Union is of the following character. The state, county, and township authorities draw a very large proportion, in the case of the two latter practically all, of their financial support from the proceeds of a direct tax laid on all forms of property. The tax applies both to real and personal property, — land, houses, buildings, horses, carriages, furniture, stock and shares, mortgages, bonds, etc. At its origination it seemed eminently reasonable. The states were forbidden to levy import and export duties, and to levy excise duties would tend to drive out manufactures to a more favored locality; they therefore of necessity fell back on direct taxes. And of all such, a single tax, laid on all forms of property alike, seemed to commend itself as the most uniform and the most equitable. In practice it has shown itself to be distressingly inequitable. This is due in part to the manner of its assessment, which is made as follows. The state authorities compute the amount of the direct tax needed for their purposes, and divide it up among the counties in the proportion of the value of assessed property in each. To the sum thus called for each county adds the amount needed for its own use and then distributes it in like manner among its townships, again according to the proportional value of the assessed property in each. To this sum the township adds what is needed for its own purposes, usually the largest amount of all. The total thus reached is distributed among all the property-holders of the township according to their proportion of assessed property; in other words the total of the assessed property is divided by the total tax to be collected, and a tax rate is thus obtained which is levied on all the property. If, for example, the total of the property was worth $5,000,000, and the total tax to be collected was $100,000, then the tax rate would be put at one fiftieth or two per cent. Under such a system, then, everything turns on the assessment. If one county has been assessed for very much less property than it actually has, then the amount of the tax assigned to it by the state will be very much less than it should be, but at the expense of the other counties, for the rate all round will need to be higher in order to supply the fixed quantity of money asked for. Or again let us suppose that in one of the townships the property is assessed for very much less than it is worth. Then the township in which the assessment is too low is given less than its share of the county tax, but always at the expense of the other townships, on account of the rate being of necessity higher than would be needed if the assessment were larger. Finally, within the township itself precisely the same thing happens among individuals. Any one whose property is put at too low a valuation, or not valued at all, escapes at the expense of his neighbors; and the more the property in general escapes assessment and remains invisible, the higher becomes the tax rate. Hence has arisen what is called competitive under-assessment, the counties and townships vying with one another in attempting to make their findable property as small as possible. The assessors, moreover, being elective officers, elected in most cases for a very short term, are personally interested in not making the total property of their area stand at too high a figure.

The upshot has been that while the system was originally devised as the most equitable form of universal taxation possible, in its actual operation nothing could be more vicious and inequitable. For it is to be observed that it in reality discriminates most unfairly between different kinds of property. Real estate, for example (lands and buildings), is much less easy to conceal than such forms of property as shares in bank stock, bonds, debentures, etc. In illustration of this it may be mentioned that in the assessment of property in Brooklyn in 1895, real estate constituted over ninety-eight per cent of the total values. Some years ago (1884) a tax commission in West Virginia reported in reference to personal property, "Things have come to such a condition in West Virginia, that as regards paying taxes on this class of property, it is almost as voluntary, and is considered pretty much in the same light, as donations to the neighboring church or Sunday school." In addition to this, a premium is put upon dishonesty, since people of a pliable conscience will find it easier to dodge the assessment than those of a more uncompromising morality. Even some of the measures intended to prevent this, as, for example, the adoption of a schedule of property made out and sworn to by the owner, and the penalties (legal and spiritual) for perjury, etc., accentuate the evil rather than lighten it. The worst feature of all is that when under-assessment once sets in, it moves forward at an accelerated pace. For the higher the rate rises, the more imperative does it become for each individual to understate his property. But the more the property is understated, the higher the rate rises, and thus the worse the situation is, the worse it tends to become. In some cases the rate becomes so high that to tell the literal truth, and pay the full tax rate, would mean absolute ruin. Thus in some of the "towns" of Chicago, previous to the reform of the assessment system a few years ago, the rate stood as high as eight and nine per cent. Now it must be remembered that this means, not the contribution of eight per cent of one's income, but eight per cent of one's capital property. To actually pay this and continue in business would not, for ordinary enterprises, be found possible. The result is that both the assessors and the assessed adopt a rough scale of depreciation, accepting as accurate a figure that is perhaps one fifth or one tenth of the probable actual value of the property concerned. Meanwhile the incentive to dishonesty remains, and a vast amount of property escapes untaxed.[1]

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[1] For detailed statistics as to the operation of the property tax, the following works may be consulted: Seligman, *Essays on Taxation*,

Throughout the entire United States opinion is agreed as to the inefficiency and iniquitousness of the general property tax. It has been condemned by a long series of state tax commissions held within the last forty years, and by all the highest authorities on the subject of public finance. "Instead of being a tax on personal property," said the New York commissioners of 1872, "it has in effect become a tax upon ignorance and honesty. That is to say, its imposition is restricted to those who are not informed of the means of evasion, or, knowing the means, are restricted, by a nice sense of honor from resorting to them." The Illinois commission of 1886 spoke of it as "a school for perjury, promoted by law." The New York report of 1893 says, "It puts a premium on perjury and a penalty on integrity." The recent industrial commission in its final report (vol. xix) quotes as illustrative of the general feeling, the words of a special committee on taxation which reported to the California senate in 1901: "From Maine to Texas and from Florida to California, there is but one opinion as to the workings of the present system. That is, that it is inequitable, unfair, and positively unjust. Theoretically all property is called upon to bear a share of the public burdens in exact proportion to its present value. In practice that end is admittedly not even approached. Scarcely a fractional part of the property in any commonwealth is brought to the tax rolls. This is especially true of personal property in its most coveted forms, money and credits."

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chaps. i, ii, and xiii, 3d edition, 1900; Ely, *Taxation in American States and Cities*; *Final Report of the Industrial Commission*, vol. xix, pp. 1031–1071.

That the reform of local taxation is one of the crying needs of the American system of government is only too obvious. But before considering the steps that have already been taken in that direction, and the various plans suggested, it will be well to set in comparison the systems adopted in other countries.

8. Systems of Local Taxation in Other Countries. Complicated as is the local administration of England, there are certain features of its financial system which merit attention in connection with the present question. In the first case the central government does not divide or apportion taxes among the county councils for collection, so that all question of competitive under-assessment as between counties is set aside. Nor is there, for reasons which will appear presently, competitive under-assessment between the minor areas. In the next place the whole field of personal property, tangible and intangible, is left out of local taxation. Thus the American difficulty of finding "invisible property" is avoided. But at the same time such property contributes to the national finance through the income tax, an adjustable tax ranging from two to five per cent, or even higher, and which, among its other categories, is levied on stocks, shares, etc., and paid at the source. Though the operation of the income tax is of course fallible, and allows the more fluid forms of income (professional, etc.) to partially escape, it nevertheless serves to make the intangible forms of property contribute to the general revenue of the state.

The actual revenues of the local authorities consist partly of sums handed over to them by the central government, and partly of "rates" (proportional taxes) which they levy on real property. To the first class belong certain payments made by the national government to the counties (administrative counties, and county boroughs), representing a fraction of the amount received as the proceeds of license taxes (liquor, dogs, guns, etc.), a fraction of the estate duties collected, and, under a statute of 1890, the proceeds of certain duties on spirits and beer. In other words the national government collects various taxes, and shares them among the counties. The rest of the local income comes from direct taxation. The rate is levied not, as in America, on the capital value, but merely on the annual value of real property. A committee of the county council fixes the county rate, assigning to each parish a standard of what the rate is to produce. This involves assessment as in America of the property value in the parish, but the valuation is never made by an elected parish officer. The county authorities follow the valuation made by the national government for the raising of the income tax, or that of the poor-law authorities, or at times make a valuation of their own. Boroughs, districts, and parishes levy similar rates on the annual value of real property. The difference in conditions between England and America is seen in the fact that while the American property tax ranges (nominally) from about one and one half to ten per cent on capital value, the total of various kinds of English local rates for the year 1895–96 stood at 4*s.* 5*d.* on the pound of annual value; in other words, while the nominal American rate is at one to ten per cent of capital, the English rate is twenty-two and one half per cent of income. Even this rate is considered in England alarmingly high. In the year 1899–1900, something over forty and a half million pounds was raised by direct taxation, and twelve and a quarter million pounds derived from the contributions of the central government.

It must not be thought, from what has been said above, that the situation in regard to local finance in England is altogether felicitous. There, however, the feature which occasions grave apprehension is not the method of assessment and levy, but the great increase of local expenditure and local debt. The local expenditure of England and Wales in 1868 was only thirty million pounds; in 1900 it reached one hundred and one million. Much of this has been paid for with borrowed money, and the total of local indebtedness stands at about three hundred million pounds. As a result local rates have increased to a great, indeed to an alarming extent. The rate per pound in 1891–92 stood at 3*s.* 8*d.*; in 1895–96 at 4*s.* 5*d.* It is true that the borrowing power of local bodies is subject to the sanction of the local government board, and the accounts of most local bodies are audited by district auditors, appointed by the same authority, and having a power to disallow items.[1] A further extension of this application of central control would seem justified by the circumstances.

In France[2] local government presents certain features differing in a marked degree from the systems both of England and America. In the first place, use is made of a sort of internal customs duty, the octroi, levied on various classes of goods brought into towns. This is one of the main resorts of communal finance, the towns as already seen being organized as communes. The same form of local tax is used in Paris and Lyons. In the year 1896 no less than 1513 French cities, towns, and villages made use of the octroi, the revenue thus produced being about one third of their total revenue. The chief articles thus taxed are wines, beer, and spirits generally, oil, meat, combustibles, fodder, and building materials. This part of the French system is certainly to be condemned. It hampers trade, and is troublesome and expensive in collection. Unfortunately, like other indirect taxes, it has the insidious quality which renders its use tempting to municipal authorities. The employment of the octroi, though abolished at the time of the French Revolution, has steadily increased in the nineteenth century, and in 1899 about one third of the population of France were subject to it.

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[1] Odgers's *Local Government*, chap. xii.

[2] For local taxation in France, see Leroy-Beaulieu, *Traité de la Science des Finances*, vol. i (6th edition, 1899).

For the rest of the municipal revenue and for the revenue of the department, a quite different plan is used. There are four great direct taxes levied by the French national government, — the tax on real estate, tax on personalty and persons (*impôt mobilier et personnel*), the door and window tax, and the tax on business. Of these the last named is a graded tax on all forms of business enterprise, varying according to the kind of business, the magnitude of the business, and the location of the business. The whole classification falls within the scope of the central government; there is no apportionment among departments, etc., and hence no chance of competitive under-assessment. It is as if the state of Massachusetts imposed a license tax on all forms of business, which, other things being equal, would be higher in Boston than in a town of fifty thousand people, and higher in the case of banking business, other things being equal, than for a grocery business, and finally would be higher in the case of a business employing one hundred men than one which only employed twenty, still with the condition that other things were equal. The total tax collected would therefore vary with the changing factors. Its use by the government of France is meant to supplement the lack of a national income tax. Of the other taxes, that on real estate is based on what is called a "cadastre," or fixed valuation made by the government on a basis of area, productivity, value of buildings, etc. The part of this valuation referring to land remains unchanged for a long time together (1821–90). That on buildings has been frequently revised. The former portion of the tax is apportioned, that is to say, the government decides on a total sum and collects it from the departments in proportion to the valuation of their land, the rate thus varying as in the United States. In the case of the latter portion of the tax, the government fixes the rate and takes the proceeds. It is the duty of the local authorities in the arrondissements to share the apportioned tax among the communes; but as the valuation on which they proceed is made for them, they are in a totally different position from that of the American assessors. The so-called personalty and persons tax (*impôt mobilier et personnel*) is in reality an apportioned tax on houses together with a capitation tax of the value (according to locality) of three days' labor. Finally the "door and window tax" is an apportioned tax on houses.

It has been necessary to show the nature of these direct taxes in order to explain the French system of local taxation. The local revenue is obtained by the addition of a certain percentage to the sums thus collected. The "centimes additionnels" as they are called, are settled by the central government, and collected by its agents. It is for this reason that it can be said of the general council of the department that it has no power of taxation. The "centimes additionnels," or sur-tax, added to the "principal" of the French direct taxes, is greater than the principal itself. No sur-tax is added to the capitation tax mentioned above.[1]

In Prussia use is made of the octroi[2] as in France, its burden falling upon mill-ground articles, cattle, meat, etc. There are also, as in France, sur-taxes added to the direct taxes of the state government and other direct taxes whose proceeds go wholly to the local authorities. The direct taxes of the first class include the income tax and the tax on circulating business; those of the second class comprise the taxes on land, houses, and fixed business. The extra percentage, or sur-tax, actually collected varies greatly, but is under the control of the central government. The land assessment is made by commissioners appointed by the state government, together with a staff of technical experts in each province. The persons liable to the income tax are divided into classes within which all pay the same. The assessment is made by a special board in each circle or county, partly appointed by the local authorities, but in the majority elected by the persons liable to the tax. Unfortunately the method of ascertaining income has not proved satisfactory. Till recently (1891), the board relied largely on circumstantial evidence of income (style of house, obvious expenditure, etc.). The objection that this was an inquisitorial proceeding led to the adoption of self-assessment by declaration. In spite of the severe penalties for fraud, a great part of income escapes. The mode of assessing the business tax is peculiarly interesting. The French system of classification by industries and by population of locality was abandoned in 1891. Instead of it businesses are grouped into four classes on a joint basis of capital invested and earnings made. The assessment of the top class is made province by province, by assessors of whom one third are nominated by the minister of finance, and two thirds by the committee of the province (the executive committee of the elected portion of the provincial government). The tax amounts to about one per cent of earnings. The two middle classes are taxed district by district (*Bezirk*), and the lowest class is taxed in each "circle," or county. The government assigns a lump sum (based on the average earnings of included businesses) to be collected from all businesses of the same class in the same district (or minor district), and this is shared among the individual business concerns by a tax committee elected from their number. It must be observed that this elected committee has no power to spare its constituents as a total. This form of tax has proved singularly efficient.

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[1] In some cases, however, "extra centimes" are added to the fixed tax for state purposes.

[2] The octroi is not used by Berlin.

9. Reform of the American System. Let us now in the light of what has been said in regard to foreign countries consider some of the chief proposals for the reform of the American system of local taxation, and the steps that have already been taken in that direction. In the first place we have the frequent suggestion of a more stringent enforcement of existing laws. This is what has been done in Ohio under the "tax inquisitor law," whereby county commissioners engage an individual to "discover" personal property, paying him a proportion of the tax thereby realized. In view of the obnoxious character of the property tax so generally condemned, mere rigor of enforcement only aggravates the situation. The Ohio system introduces a feature of management which should have no place in public administration, except in dealing with the criminal class. Nor is the system of making the legal assessment value (as recently done in Chicago) only a fraction of the true value, of any permanent efficacy. It affords, it is true, the opportunity for a general repentance and a new start, but the viciousness of the assessment system is not altered thereby. The proposals which appear to be substantiated by the experience of foreign countries are (1) the separation of the sources of state and local revenue, and the abandoning of the system of apportionment, (2) the abolition of the property tax on personal property, and (3) the creation of other forms of revenue to fill the void thus created and to satisfy the equities of taxation.

The first of these proposals has been endorsed by the American League of Municipalities, by the New York State Commerce Convention, and by various other bodies. In Oregon under a statute operative in 1905, apportionment of state taxes among the counties is abandoned. The proportion of state taxes paid by each county will depend on the ratio of its own expenditure to the total expenditure of the counties. The Industrial Commission in its Final Report (1902) recommends that the states (not the localities) abandon the property tax altogether. In the second place the abolition of the tax on personalty would leave only land and buildings subject to the property tax. The motive for concealment would be lessened, since there would no longer exist the sense of injustice at the escape of personalty from a tax to which it was legally liable. The experience of England and Prussia certainly falls in with the suggestion of the commission that this tax should be for local purposes only. It might seem advisable that when the system of elected assessors exists it should be abandoned in favor of assessors appointed by the government of the state and holding an independent tenure of office. Such a suggestion is but little consonant with the current political ideas of American people. But the experience of European countries certainly favors it. A valuation of land on the French system by general survey and estimate would reduce that portion of the tax to a stable basis.

In reference to the third question, that of creating other sources of revenue, much has already been done in some states and there is much that naturally suggests itself. The successful business taxes of Prussia and France seem to indicate a useful form of taxation. The Industrial Commission recommends the adoption of taxes of this nature as a supplement to the property tax. In several of the Southern states there already exist "licenses" or "privilege taxes" which are of this kind. They are by no means so elaborate as the Continental taxes, varying only according to population or other evident criteria, but not proportional to the volume of business transacted. A more elaborate form of business tax with the Prussian system of assessment would be a decided gain. The taxation of income is also recommended by the commission; theoretically the income tax is the most equitable of all, but experience shows it liable to grave inequalities. It might well form a part of a reconstructed tax system for state purposes, especially if income from real estate were omitted, being already taxed under the local property tax, and if the English system of tapping the income at its source were put into force. Separate income taxes have recently been levied in Virginia, North Carolina, and South Carolina. Massachusetts has an income tax which exempts income from taxed property, and which dates from colonial times. Pennsylvania and Louisiana attempt, but not very successfully, to tax income under the property tax. An amended taxation of corporations — which are now taxed in various ways, on the value or on the cost of property, on capital stock, on bonded debt, on gross earnings, on dividends, on net earnings, etc. — is also proposed. In summary it may be said that what is needed is a complete reconstruction of local taxation. The general object should be to avoid the present evils of competitive underassessment and invisible property and to institute a new composite system of revenue calculated to properly distribute the burden of taxation.

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CHAPTER VIII

PARTY GOVERNMENT

1. Conflict of Opinion on the Merits of Party Government.— 2. Origin and Development of the Party System in England.— 3. Origin and Growth of Political Parties in the United States.— 4. The Organization of American Political Parties.— 5. Reform of the System.— 6. Party Machinery in Great Britain.— 7. The Party Groups of Continental Europe.

1. Conflict of Opinion on the Merits of Party Government. By a political party we mean a more or less organized group of citizens who act together as a political unit. They share, or profess to share, the same opinions on public questions, and by exercising their voting power towards a common end, seek to obtain control of the government. They constitute something like a joint stock company to which each member contributes his share of political power. They are thus collectively able to acquire the strength which it would have been impossible for them, acting singly, to obtain. In all except the autocratic modern governments this system of deliberate collective action supplies the motive power which keeps the wheels of administration moving. Though standing almost outside of the legal structure of the state, party government is the vital principle of its operation. The Constitution of the United States does not indeed presume the existence of political parties; but in the evolution of American government in the nineteenth century, they have come to be its central feature. In the United Kingdom the law of the constitution knows nothing of any such institution. But the customary operation of the Constitution is altogether based on the supposition of this sort of collective action. For the whole cabinet system — which we have seen to be the central fact of British government — presupposes the united action which alone can render its existence possible. The countries which have deliberately adopted parliamentary government — France, Italy, Canada, Australia, etc. — have done so on the same assumption. The law cannot, indeed, expressly decree the existence of parties, but it can set up institutions, as in the countries named, which become meaningless without them. For a proper study of modern government it is, therefore, necessary to take full account of this form of joint political effort and to study the organization and operation of modern parties. We may thus form some judgment as to the value and efficiency of the political expedient thus devised.

Party government, indeed, has been variously judged. It has been extolled as the most natural and condemned as the most unnatural of political phenomena. Those who judge it harshly are shocked by the peculiarly artificial agreement which it sets up among the group of party adherents, and their equally artificial disagreement with their opponents. Each side remains in a state of willful inconvincibility, with individual judgment frozen tight in the shape of the party mould. This kind of unanimity seems to its critics false and injurious; it suppresses that very freedom of individual opinion and action which is meant to be the vital principle of democratic government. Where two great political parties dispute the field, it presumes, as has been said by Professor Goldwin Smith, "a bisection of human character," which does not in reality exist. Those who defend party government take an entirely opposite ground. They draw attention to the fact that in a certain sense the bisection of human nature is altogether in accordance with fact. There are naturally, they claim,[1] four kinds of men, — those who wish to return to the methods and institutions of the past (reactionaries), those who wish to retain those of the present (conservatives), those who wish to reform present institutions (liberals), and those who desire to abolish them (radicals). If for evident reasons of expediency the two former classes and the two latter act together politically we get a division into two great political parties, resting on fundamental psychological principles. It is further argued that far from being in conflict with the theory of democratic government, it is the only thing which renders the latter feasible. For it is impossible for all the people to rule all the time — taken singly. The rule of the people can only mean the rule of a majority. Now the only way in which any particular set of people can remain together as a majority, and thus render possible a stable and consistent administration of public affairs, is that the members of the ruling group shall "agree to agree" with one another. A modern democratic state without this somewhat artificial and yet essential unanimity would become a brawling chaos of individual opinions.

The validity of the two contentions thus urged will depend in some measure on the circumstances of the time and country. It often happens — as in the case of the slavery question or the silver question in the United States, the free-trade question in England, etc. — that some one paramount political issue presents itself which of necessity separates the community into affirmative and negative divisions. The importance of the issue is such that the supporters of either side are perfectly willing to subordinate to it all minor matters and to act in concert in everything for the sake of the main point to be gained. Two free-traders or two free-silver men might consent to vote and act together, and to put their interests into the hands of the same representative, even if the one of them was a prohibitionist and the other an anti-prohibitionist. It is in such cases as this that the party system seems eminently a defensible one; it offers a natural and reasonable method of reaching the main object to be achieved. This was the condition in the United States in the middle of the century. It was also the chronic condition in England during a large part of the nineteenth century, the general idea of liberal reform being opposed to the general immobility of conservatism. It was owing to the existence of this state of things that party government grew to be invested with an air of inevitability, and seemed to carry with it its own defense. On the other hand, where no such main issues exist the party system must depend for existence on the strength of its organization. It must have pledges first and principles after, and its members, having first decided to agree, must next make up their minds what it is they agree about. This is the present position of the party system in the United States. Failing this, for default of a main issue, political parties will take the form of numerous and rapidly changing groups, the government being carried on by temporary and unstable combinations, and the parties, having neither traditions nor standing power, being animated with a dangerous sense of irresponsibility. This is the position of affairs in France, Italy, and several Continental countries. At the present juncture, then, the party system meets with keen criticism and speculation is rife as to its future evolution.

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[1] See W. E. H. Lecky, *Democracy and Liberty.*

2. Origin and Development of the Party System in England. The origins of party government are found in England and may be considered as dating from the Elizabethan era. The Puritans, opposed to the intolerance and the extreme prerogative of the queen's government, exerted themselves to gain seats in Parliament, where their representatives acted as an organized party in arresting the royal grants of monopolies, etc. On the basis thus formed grew up the popular party, whose cohesion was rendered stronger by the arbitrary government of the Stuart kings. "Sandys, Coke, Eliot, Selden and Pym, may be regarded," says Sir Thomas May,[1] "as the first leaders of a regular parliamentary opposition." As the resistance to the royal tyranny increased, the defenders of popular rights and the adherents of the crown changed from political parties to the opposing factions of a civil war. But after the Restoration the same parliamentary division reappears under the name of the Court Party and the Country Party of the reign of Charles II. With the debates over the Exclusion Bill of 1680 (for debarring the king's brother from the throne) the nicknames of Whig and Tory (terms equivalent to "dough-face" and "highwayman") first appear. Henceforth for a century and a half these names indicate the two great political parties by whom the parliamentary activity of the United Kingdom was controlled. The Whigs were the opponents of the royal prerogative and the adherents of the doctrine of parliamentary supremacy; the Tories advocated the power of the crown. Their relation to the later parties must not be mistaken. Neither was by its origin the party of progress or reform; neither the party of stability or order. They represented merely two different theories of English constitutional relations. After the accession of the House of Hanover the two parties found their positions curiously reversed. The Whigs, the opponents of prerogative, were the supporters of the new dynasty, while the Tories, the advocates of prerogative, were the opponents of the holder of the crown. This blunted the edge of their original hostility, and helped to convert them from the position of inimical factions to the decorous and official form of opposition since maintained. Moreover the practical triumph of the principle of parliamentary supremacy, and the recognition of the hopelessness of the Stuart cause, led to an alteration in the distinctive characteristics of the two groups. From the accession of George III onwards, the Whigs tended to become the advocates of reform and progress; the Tories placed their faith in order and security. Thus the two changed into the great Liberal and Conservative parties of the nineteenth century. The doctrine of liberalism favored the increased "democratization" of the constitution, the grant of equal political privileges to all, the abolition of the remaining religious disabilities and tests, the establishment of economic liberty of trade and industry. To this the Conservatives opposed the historic view of political rights that had grown up under the constitution, the safeguarding of vested interests, and the resistance of dangerous innovation. But since the middle of the nineteenth century, these original characteristics of the two parties have largely been obscured. The Conservative administrations have participated in many of the great reforms of the latter part of the nineteenth century, — the extension of the suffrage, the reform of local government, of Irish land tenure, and so forth. The present complexion and organization of party life in the United Kingdom will be considered in a later paragraph.

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[1] Sir T. E. May (Lord Farnborough), in his *Constitutional History*, vol. ii, chap. viii, gives an account of the rise and development of the party system in the United Kingdom.

3. Origin and Growth of Political Parties in the United States. In America we may consider distinct political parties as beginning with the colonial controversies of the eighteenth century. The standing opposition of the representative portion of the colonial governments to the governor and his associates, naturally divided political sympathy on much the same lines as in the mother country. As in England during the Stuart period, the war of the Revolution changed the partisans into armed combatants. But with the making of the first truly national government (1787) political parties reappear on an entirely new basis. Those who favored the establishment of a strong central government became known as the Federalists, while those in favor of the restriction of the federal power were termed Anti-federalists. After the adoption of the Constitution the term Federalist indicated those in favor of consolidating and strengthening the federal power, while those in favor of the rights of the states were called Republicans. The latter, being supported by the general trend of public opinion in favor of the rights of the individual and the restriction of governmental functions to a minimum, then current both in Europe and America, eventually carried the day. The Federalists declined in numbers and influence, and in the early twenties were practically extinct. Their opponents had in the early years of the Constitution strengthened their hold upon popular sympathy by adopting the name Democratic Republican, which has developed into the present term of Democrat. After the disappearance of the Federalists, the absence of definitely marked political parties led to a sort of interregnum known historically as the Era of Good Feeling; this designation and the lapse of time has surrounded with an undeserved halo a decade which "was really," says Professor Hart, "a period of bitterness and rancor and legislative ineptitude."[1]

With the advent of Andrew Jackson (1829) the Democratic party entered on a new phase, in which it stood for extreme individualism, the extension of the suffrage, and the rights of "the people" in the special sense of the term. This raised up in opposition the party of the Whigs, advocates of strong government, national improvements (roads, canals, etc.), and a protective tariff. The rising predominance of the question of slavery (1820–1860) sundered the Whig party and removed them from the political arena. In their place sprang up anti-slavery parties of different degrees of opposition. The voting strength of these was finally gathered together as the Republican party, opposed to the further extension of slavery, though not (as a party) opposed to its existence. The Civil War removed the main issue by abolishing slavery. Since then the same two great parties have remained in name, but their evolution in the last forty years has rather taken the form of a consolidation of the organization of party structure than a collective adherence to any single principle or policy. The Republicans are in favor of protection, but the Democrats are certainly not free-traders. The Republicans, but not all of them, are in favor of the gold standard, and for a time some of the Democrats, but not all of them, opposed it. The states of the South have remained solidly Democratic, but this is by the historic continuity with past conditions. The plain truth is that both parties are largely opportunistic, adapting their policy on current questions to the circumstances of the day, and mainly governed in their selection of political opinions by the probability of political success. The party organization has become the leading factor, and the party opinions have taken a secondary place. A Republican is no longer to be defined as a man who holds such and such opinions, but as a man who adheres to the Republican organization and will support its candidates. At present, then, the striking fact in connection with American political parties is the complete mechanism of their organization.

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[1] *Actual Government* (1903).

4. The Organization of American Political Parties. That parties should have become highly organized is the natural outcome of the circumstances of the country. Among the contributory causes are to be noted in the first place the disjunction of executive and legislative power, which naturally calls for a bond of union in the shape of a party organization.[1] To this we must add the great extent of territory to be covered, the impossibility of selecting candidates for the presidency, or for the state governorships, secretaryships, etc., in any purely spontaneous fashion. Nor is there under the American system any set of persons among those holding power who are placed in the same position of evident party leadership as has always been the case with the party leaders in England. The attempt of the members of Congress to assume this position and to nominate candidates for the presidency in a party "caucus," soon fell into disrepute, and in 1824 broke down altogether. The similar attempt of the state legislatures in the decade following was equally ineffective. In place of this there sprang up in the twenties, in accord with the general American idea of the sovereignty of the people, the practice of holding a special "convention" or meeting of representatives selected by the members of a political party, to make the choice of its candidates. The system thus established grew apace. As long as the great slavery issue was before the nation, the convention failed to give to the political parties the highly mechanical aspect they have since assumed. But from the close of the Civil War the machinery has become more and more definite, until it has reached the elaborate form in which it now exists.

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[1] See in this connection F. Goodnow, *Administration and Politics.*

The scheme of its construction is as follows.[1] Its organization follows the division of areas made for the purposes of elections. In each of these a special meeting of party adherents is held for the selection of candidates. The basis of it is found in what is known as the primary, often called a "caucus," in the New England states. In theory this consists of a meeting of all the qualified party voters resident in the smallest voting area: township, county, or precinct, as the case may be. In actual fact it is only a minority of the voters of the party who are to be found at a meeting of the primary. Many absent themselves from indifference, others for lack of the technical requirements for admission. Others properly qualified are excluded by unfair means. This is particularly true of primaries held in urban areas, where the voters have but little individual acquaintance with one another. The duty of a primary meeting is threefold. It appoints the standing committee of the party for that area, it nominates party candidates for the elections held in its district, and, most important of all, it sends up delegates to the party meetings held in the area of which its own forms a subdivision. In these larger areas, such as a congressional district, or state assembly district, or state senate district, it is impossible for all the voters to be gathered together. In them, therefore, the party meeting takes the form of a "convention," composed of delegates sent from the primary meeting. The functions of such a convention are similar to those of the primary itself. It appoints a committee, it makes nominations for office in the district, and in the case of some areas it sends up delegates to the state convention. The state convention similarly nominates candidates for the governorship, etc., appoints the state party committee, and sends delegates to the national convention held once in four years.[1] This national convention stands at the apex of the system. It is held for the selection of the party candidates for the presidency of the United States. It consists of twice as many members as the state has members of Congress, two delegates being sent from every congressional district, and four from each state at large; these together with six representatives from each territory make in all 994 delegates, which is at present the full complement of a national convention. A duplicate set of members known as "alternates," or substitutes in case of accident, are also appointed. The convention thus constituted draws up the national platform of the party, and makes its nominations for the presidency. The nomination is made by ballot; in the Republican party a simple majority suffices, in the Democratic a majority of two thirds is needed. In the Republican party the members of the delegation sent from a state may vote individually for different persons; in the Democratic party they must vote as a unit for the same person.

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[1] Mr. Bryce's admirable description of party machinery in the United States, *American Commonwealth*, vol. ii, part iii, has never been surpassed. For more recent information see Hart, *Actual Government.*

The system as thus planned is beautiful in the symmetry of its organization. It seems to offer a thoroughly just method of selecting party candidates, and one in which all are equally entitled to participate. But unfortunately in practice it has opened the way to the gravest political abuses. In the first place it makes a considerable demand upon the time and energies of the voters, a demand rendered all the greater by the multiplicity of American elections. There is a natural temptation for the voter to stay away from the primary, and to content himself with whatsoever candidates it may select. The conduct of the primary, and as a consequence, of the superior coventions to which it is contributory, thus falls under the control of the professional "politicians" and their hangers-on. Hence arises the now familiar phenomenon of the "party ring" and the party "boss," for whom the elaborate system of party machinery serves as a ready-made instrument of political control. The more the primary falls under the control of an inside ring, the more are the ordinary citizens tempted to stay away from it, deploring its vices, yet unable single-handed to combat them. In the city primaries the number of those entitled to vote, who actually do vote, is seldom more than one third, and often drops to the merest fraction. Even the number of those entitled to vote in the primaries has often been only a small part of the voters of the party. For as long as the primaries remained self-constituted bodies, it was possible for them, as for example in New York, to adopt exclusive rules of admission which shut out all but the favored few. The persons who were entitled to vote in a primary, and actually did vote, became only a fraction of a fraction. Indeed the whole of the elaborate party machinery that we have described comes to be operated not from its own spontaneous force, but at the bidding of the clique of inside politicians, who "work the machine." Instead of the real selection by a party convention, we have the adoption by the convention of a "slate," or list of names already prepared for them. The worst feature of all is the class of men thus brought into American politics, and the point of view they bring with them. The nature of the party machine lends itself to repel the honest and to attract the unscrupulous. Relatively few men have sufficient public spirit to consent from purely patriotic motives to seek office by such obnoxious means. The opportunity is thus opened to second-rate, shifty, and self-seeking aspirants, to whom the whole party machinery merely offers a method of gaining an easy livelihood, embellished with a tawdry conspicuousness. Too much stress must not, however, be laid on the sinister side of American party life. It is not true, as a foreign observer might be inclined to think, that the American people as a nation are corrupted by it. In moments of stress or in the presence of a great national crisis, the artificial barriers set up by such a system are easily pushed aside, and the right men shoulder their way to the front of public life. But in the ease of quiet times, and in the absorbing prosperity of a great industrial civilization, the machine falls back again into the hands of those who make it their business to run it.

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[1] Delegates are sent to the national convention from the state conventions, or from the congressional district conventions. In any case the four delegates corresponding to the representation of the state in the Senate are sent from the state convention.

5. Reform of the System. The question of finding a remedy for the evils of a party machine has long been discussed. The only real and permanent cure would be found in rousing the ordinary voter from his habitual indifference and absorption, and bringing him to take an active interest in the exercise of his full political rights. This, however, is a matter quite beyond legislative control, and can only come with the growth of vigorous public sentiment in regard to the duties of a citizen, stimulated by the object-lessons afforded by rampant corruption. It may in any case be doubted whether, with the present system of short terms of office and numerous elections, such an active public life of the citizens at large could be gained without serious detriment to their other social activities. It would be easier to reform the operation of American parties, if the attempt were accompanied by the lengthening of elective tenure of office. Why, for example, should an elective officer hold office, as do a vast number in the United States, including two state governors — for one year only? Or a member of a legislature, as is customary, for two years only? There is nothing peculiarly democratic about the space of twelve months; if change is a good thing in itself, why not hold a new election every month? With fewer elections the ordinary voter would be able to concern himself more directly with those there were, and the practical exclusion of the majority from political control would no longer be possible.

Even within the limits of legislative action attempts have already been made to remedy the evil operation of the party system. The first of these is the plan of making the primary meeting of a political party a legally organized body instead of a self-constituted group. This is the intention of the so-called "primary election laws" which have been enacted within the last ten years in most of the leading states. Massachusetts, New York, New Jersey, Pennsylvania, Illinois, Ohio, Michigan, Maryland, South Carolina, Georgia, and other states have already adopted statutes of this kind. These laws provide that due public notice shall be given of the time and place of primary elections; that the elections shall be by ballot, and that the expense shall be paid by the state. The laws are usually compulsory in cities and optional in rural districts. The above provisions still leave the question of admission to the primary to be regulated by the party itself. But in some states the law goes further, and defines the qualification required for admission to the primary. The general aim is to give to all persons who voted with their party at the last elections, the right to a vote in the choice of candidates in the primary.

A still more fundamental improvement is hoped for by the adoption of the system of "direct nomination," already in use in certain elections in the state of Minnesota, and largely advocated throughout the country. The aim of this plan is to do away with the selection of candidates by a party caucus. In place of it is held a preliminary election in which all voters participate. Each voter indicates the name of the candidate he nominates, and the party for which he nominates him. Prospective candidates may announce their names to the public before the preliminary election, although such an announcement is not theoretically a requisite to the working of the plan. The result of the election is to give the official nomination in each party to the person receiving the largest support. It is thus somewhat akin to the

French system of "double balloting."[1] The peculiar difficulty encountered is that voters may with malicious intent help to nominate an inferior candidate in the party opposed to their own. The Minnesota law was recently amended to try to prevent this; the vote is also made compulsory to force indifferent citizens to the polls. It may safely be said, however, that no purely mechanical legislative aid will eliminate the standing difficulty. The adoption of direct nomination, unless accompanied by a regeneration of public spirit in operating it, would only lead to the existence of some extra-legal machinery for selecting candidates as a preliminary to the preliminary election itself. The old evil of the ready-made "slate" would reappear, altered perhaps in form, but unchanged in substance. On the other hand the agitation in favor of direct nomination is itself a wholesome sign of the increasing protest against the dominance of the machine politics.

6. Party Machinery in Great Britain. In the United Kingdom party machinery is not found in the same highly organized state as in the United States. This has been due to the fact that it is not so necessary. The cabinet system, as has been seen, puts executive and legislative power into the same hands. In America the party organization forms the connection by which the two legally distinct branches of the government are brought into harmony. This function therefore is not needed in England. Add to this the fact that the

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[1] In France if no candidate has an absolute majority over all the others a second election is held about a fortnight later. In this the candidate with most votes is elected. Owing to the great number of French parties the first election acts as a sort of trial nomination.

English parliamentary elections are much less numerous than the various elections for federal and state offices in the United States. Nevertheless the use of regular party machinery is growing in Great Britain; though long regarded by many English people with disfavor as an American importation, its obvious utility for election purposes has ensured its adoption.[1] At the centre of English party structure stand two great political organizations, — the National Conservative Union and the National Liberal Federation, — whose headquarters are in London. Of these bodies affiliations are formed in each polling district of a parliamentary constituency, made up of the active adherents of the party in that area. This is the germ cell of party structure, corresponding to the American primary. It elects representatives to a party council of the whole constituency, and from these constituency councils representatives are sent to form a council for the whole county or borough. Finally this last council elects representatives to the central body at London. The party leaders in Parliament naturally exercise a controlling influence, somewhat as the congressional caucus of the early nineteenth century aspired to do. The caucus broke down because under the American federal system the national congress is not the sole and supreme organ of national political life. But the different situation in which the British Parliament is placed naturally puts the party leaders in a position to exercise a radiating control over all the constituencies. The affiliated branches of the organizations mentioned act as the means of giving definite direction to this control. With the gradual evolution of the "party convention" the system of party "platforms" is beginning to appear. Authoritative "open letters" or addresses of the great party leaders and resolutions passed by the councils, constituencies, etc., are of this character. Candidates are still selected in somewhat irregular and varying fashion, accentuated by the fact that residence in the constituencies is not needed as a qualification. The custom of reëlecting the same person again and again obviates the necessity of making a selection. If a new choice must be made, it is done either by the constituency council, or if they cannot agree, the central council at their suggestion proposes a likely candidate to them, or even indicates two or three from whom they may select.

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[1] Few works on British government contain any reference to party organization. The student may consult Michael Macdonagh, *The Book of Parliament*; and Leonard Courtney, *The Working Constitution of the United Kingdom.* See also Ostrogorski, M., *Democracy and the Organization of Political Parties.*

7. The Party Groups of Continental Europe. On the continent of Europe party governance presents certain features differing markedly from the situation hitherto existing in America and Great Britain. Instead of two great political parties overshadowing all others, and alternating in the control of the government, we find in France, Germany, and Italy a considerable number of party groups, no one of which is strong enough to outnumber all the others. In France and Italy, this is a particularly disturbing element in public life, since the administration of those countries is based on the cabinet system, rendering the executive government dependent on the continued support of a majority in the lower house of the legislature. Under the group system of party life, no one party is able to afford that support. It must therefore be obtained by means of a coalition of separate parties whose mutual support is given purely for reasons of expediency, and may be withdrawn at any time in favor of a more profitable combination. It is to this fact that is due the notorious instability of French ministries under the Third Republic. There exist in France about seven major political parties, with minor subdivisions. Following on the general elections of 1902, the classification of the Chamber of Deputies comprised 111 Government Republicans, 99 Progressist Republicans, 129 Radical Republicans, 90 Socialist Radicals, 59 Nationalists, 50 Conservatives, 49 Socialists. The first of these represent the supporters, *par excellence*, of the present régime. The Nationalists and Conservatives are the result of the reconstruction of the former monarchial parties. The others are of various degrees of radicalism and socialism. No one of these is strong enough to support a ministry by itself. All the ministries of the Third Republic, with the exception of the short-lived radical ministries, have been formed with the Government Republicans as the nucleus, with contributory support from other fluctuating groups. The instability which naturally resulted has been aggravated by the methods of French legislative procedure, it being customary for the cabinet to resign even if defeated on matters of minor moment, or in consequence of an "interpellation"[1] in the Chamber of Deputies. Even the members of the cabinet itself are less interested in its continuance than is the case in England, since they may very possibly themselves form part of the reconstructed cabinet which supplants it. The relation of political parties to cabinet government thus stands upon quite a different footing in France from what it does in the United Kingdom. Indeed the commendation which it has so largely met in the latter country rests on the presumption of the existence of two great parties as a sort of natural phenomenon likely to continue. The absence of such in France upsets the whole calculation. In Italy and in the German empire, there is the same subdivision of party groups. The elections to the German Reichstag of June, 1903, showed at least a dozen different parties. The Reichstag contains 397 members, but even the most numerous of the parties, the clericals, had only a hundred seats. Several of the parties (anti-Semites, moderate Radicals, etc.) had less than ten. The subdivision of parties is, however, of much less national consequence in Germany than in France, since parliamentary government does not exist.

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[1] The "interpellation" differs from the "questions" raised in the British parliament in that a debate on the point raised is allowed after the interpellation, but not after a question.

Looking at the institution of party government generally, it seems liable to one or the other of two grave dangers. If bisection of opinion on a paramount issue does not exist, then the consolidation of the party may become a purely mechanical affair. What was in its origin a natural bond of union may degenerate into the cohesion created by artificial party ties. On the other hand, where such cohesion, natural or artificial, is not forthcoming, parties assume the fragmentary and unmanageable form seen on the continent of Europe. In Great Britain, where the operation of the constitution in its present shape is dependent on party government, the situation of public affairs at the opening of this century is at a very interesting juncture. Within the last two decades the older line of cleavage has been intersected in all directions with new divisions. The adoption of the Home Rule policy by Mr. Gladstone (1886) divided the Liberals into Unionists and Home-Rulers. The adhesion of the former to the Conservatives partially healed the breach thus created. But with the close of the century the division into Imperialists and anti-Imperialists, Protectionists and Free-Traders, and other minor rifts of opinion has violently disturbed the formation of parties. It remains to be seen whether the British political parties will disintegrate into groups, will adopt a formal system of union with pledges and platforms on the American plan, or will find some means of reverting to their earlier condition of "natural" opposition on a fundamental question. It is more in accord with the history of British parliamentary life to presume that the present dominant fiscal question will lead to a new division of parties on a single line of cleavage.

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TABLE OF LEGISLATURES

	Name of Upper House	*Name of Lower House*	*No. of Members in Upper House*	*No. of Members in Lower House*	*Term of Upper House*	*Term of Lower House*	*Composition of Upper House*				*Constitutional Relation of the Two Houses*
							Clerical Representatives	*Hereditary Representatives*	*Appointed*	*Elected*	
UNITED STATES	Senate	House of Representatives	90	386	Each senator 6 years; one third renewed every 2 years	2 years	0	0	0	90	"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." Constitution, art. i, § 7.
THE UNITED KINGDOM	House of Lords	House of Commons	593 (1905)	670	Life, except Peers representing Scotland	7 years unless Parliament previously dissolved	2 archbishops 24 bishops	519	4 Lords of Appeal	28 from Peers of Ireland; 16 from Peers of Scotland	The Commons have exclusive control of the raising and spending of money. In other matters the relations of the houses stand thus: "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought at some point (not definitely fixed) to give way; and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the crown, or of its responsible advisers, to create or threaten to create enough new Peers to override the opposition of the House of Lords and thus restore harmony between the two branches of the Legislature." Dicey, "Law of the Constitution," pp. 384 *et seq.*
CANADA	Senate	House of Commons	81	214	Life	5 years unless sooner dissolved	0	0	81	0	"Bills for appropriating any part of the public revenue or for imposing any tax on imports shall originate in the House of Commons." British North America Act, 1867, § 53.
AUSTRALIA	Senate	House of Representatives	36	75	6 years	3 years unless sooner dissolved	0	0	0	36	"Proposed laws appropriating revenue or moneys or imposing taxation shall not originate in the Senate. The Senate may not amend proposed laws imposing taxation or proposed laws appropriating revenue or moneys for the ordinary annual services of the government." Commonwealth of Australia, Constitution Act, 1900, § 53.
FRANCE	Senate	Chamber of Deputies	300	584	9 years. One third of the senators retire every 3 years	4 years unless sooner dissolved	0	0	0[1]	300	"Finance bills must first be presented to the Chamber of Deputies and voted by them." Loi Constitutionelle, 24 Feb., 1875, § 8.
GERMAN EMPIRE	Bundesrath	Reichstag	58	397	At the discretion of the constituent parts of the Empire	5 years unless sooner dissolved	0	0	58	0	Coördinate powers. "Imperial legislation is effected by the Bundesrath and the Reichstag. The consent of the majority vote of both houses is necessary and is adequate for an imperial law." Constitution, act 5.
PRUSSIA	Herrenhaus	Abgeordnetenhaus	About 330	433	Life	5 years unless sooner dissolved	Representatives of chapters	103 and the princes of the royal house	*Ex officio*, 4; appointed by king on presentation by landowners, universities, chapters, etc., 170; others appointed, 45	0	"Finance bills shall be submitted first to the Chamber of Deputies: they shall be accepted or refused in their entirety by the House of Lords." Constitution, 1850, v. § 62.
SPAIN	Senate	Congress	360 maximum	431	Life	5 years unless sooner dissolved	0	80 maximum	100	180	"Laws in reference to the taxes and the public credit must be first presented to the Congress." Constitution, 1876, § 42.
AUSTRIA[2]	Herrenhaus	Abgeordnetenhaus	About 260	425	Life tenure	6 years unless sooner dissolved	18	68	157	0	"The consent of both houses and the consent of the emperor is necessary for every law. If in a finance law in regard to particular items, or in a law for raising recruits in regard to the number of the contingent to be raised, in despite of repeated consideration no agreement can be reached by the two houses, then the lower sum proposed shall be considered as adopted." Fundamental Law of 21 Dec., 1867, § 13.
HUNGARY	Förendiház (House of Magnates)	Képriselöház (House of Deputies)	408	453	Life tenure except *ex officio* members	5 years unless sooner dissolved	55	257	74 and 19 *ex officio*	3 (delegates from Croatia)	Coördinate. — Custom and Law of 1885, § 13.
ITALY	Senate	Chamber of Deputies	341 (year 1905)	508	Life	5 years unless sooner dissolved	0	4 princes	337	0	"Every law for imposing taxes or for sanctioning the balances or accounts of the state shall be presented first to the Chamber of Deputies." Statuto, art. 10.
SWITZERLAND	Ständerath	Nationalrath	44	167	At the discretion of the constituent cantons	3 years	0	0	44 (appointed by cantons)	0	Coördinate powers. — Constitutional Act 89. "Federal laws can only be passed with the consent of both houses."

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[1] By the law of 1875 (since repealed) seventy-five of the senators were to be appointed for life by the two chambers; a few of the appointed members still remain.

[2] Austria-Hungary has, for purposes of political union, two legislative bodies called the Delegations, one consisting of 60 members chosen by the Austrian Parliament, and one of a like number chosen by the Hungarian parliament. They sit and debate separately, but for the purpose of forcing an agreement they meet together for a general vote.

PART III

THE PROVINCE OF GOVERNMENT

CHAPTER I

INDIVIDUALISM

1. The Individualistic Theory of the Functions of Government. — 2. Individualism as based on a Theory of Justice. — 3. Based on a Theory of Profitability; the Doctrine of *Laissez Faire*. — 4. Based on a Biological Analogy; the Survival of the Fittest. — 5. Conflicting Forces.

1. The Individualistic Theory of the Functions of Government. In the first and second divisions of the present volume we have considered the general nature of the state, and the constitution and structure of governmental bodies. The discussion of the form of government has of necessity preceded the treatment of the proper sphere of its operation. Yet in our own time the latter topic in practice assumes the place of paramount importance. The general opinion of civilized countries recognizes the validity of the principles of popular sovereignty and democratic government, — whether expressed by means of a limited monarchy or in a republican form.[1] It is generally admitted also that the adoption of popular government does not, in and of itself, as the sanguine theorists of a hundred years ago hoped it might, offer a solution of all our political and economic problems. Even granting that the government is to be controlled by the people and for the people, we have yet to ask what is to be the proper sphere of its operation for the general benefit. We employ in ordinary discourse a variety of phrases to indicate the subject in question, speaking indifferently of the sphere of the state, state control, the functions of government, the province of government, etc. More special aspects of the problem are seen in connection with government ownership of railways, the control of trusts, and the management of public utilities. But whether in its general theoretical aspect or in particular form, the problem involved is emphatically the paramount question of the opening of the twentieth century. In the following three chapters we shall endeavor to deal with it in systematic form, considering one after another the solutions that have been offered in theory and practice to the open question of government control. First we shall deal with the individualistic solution, or system of natural liberty, to which we have already referred in a somewhat different connection in a preceding chapter. In the second place we shall discuss the ideals of collectivism, and the attempts that have been made for its partial realization. The discussion of the actual economic operations of modern states on what may be called an individualistic basis modified to a great extent by utilitarian and opportunistic considerations, will be considered in conclusion.

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[1] In stating that the general consensus of opinion is in favor of democracy, it is not to be denied that popular government has found occasional detractors among writers of reputation and ability. Sir Henry Maine (*Popular Government,* 1886) declares it to be "extremely fragile," "not in harmony with the normal forces ruling human nature," and "apt therefore to lead to cruel disappointment or serious disaster."

To the treatment of the individualistic doctrine of the functions of government belongs of right the precedence. For it constituted during a large part of modern times what might be called the official creed of enlightened governments; was, until our own generation, defended by the greatest theorists of the modern era, and although discredited in its extreme form, remains as the working basis of the economic operation of both the American and the British governments. The individualistic theory may be briefly stated in the proposition that the sole duty of government is to protect the individual from violence or fraud. According to this theory the positive interference of the state with the individual even in his own interest is not justified. Nor is the state justified in undertaking operations of an economic character, or in imposing restrictions (other than in prevention of violence or fraud) on the economic activities of its citizens. A schedule of government functions admissible on a purely individualistic plan would include the maintenance of an army and a navy, courts of justice and a force of police, the enforcement of a criminal law and of statutes in reference to sanitation, adulteration of food, inspection of steamboats, etc., these being indirectly protective in their character; but it could not comprise the conduct of the post-office, the maintenance of hospitals and poor-houses, or the operation of railroads. Only such actions on the part of the state as were directed to prevent the interference of its citizens with one another would be legitimate.

2. Individualism as based on a Theory of Justice. This system of individual liberty against the interference of government has been defended on different grounds. As a matter of justice it has been argued that the individual has a right to be let alone. On economic grounds it has been contended that it pays to let him alone. Lastly, on purely scientific grounds, it has been argued that it is in general consonance with the evolutionary nature of human progress that the individual should struggle for himself and survive, or fail, according to his fitness. The first of these arguments — the restriction of the operation of government to the defense of the rights of the individual — is especially found in the writings of the political philosophers of the later eighteenth and early nineteenth centuries.[1] We find it in the theory of the state advanced by Kant and Fichte and following as a corollary upon their view of the doctrine of the social contract. Kant, actuated by a spirit of protest against the paternal interference of the Continental governments of his day, and their intrusion into the private life of the citizen, bases his views of governmental functions on the idea of liberty, and assigns to the state "the hindering of the hindering of liberty" as its proper policy.[2] But among German writers Wilhelm von Humboldt, in his "Sphere and Duties of Government," offers the most complete expression of the thoroughgoing political individualism characteristic of this period. Taking as his starting-point the "individual man and the highest ends of his existence," Humboldt finds the paramount consideration to be that of individual variety and self-development. On this the active interference of government can have none but a detrimental effect. For this reason "the state is to abstain from all solicitude for positive welfare, and not to proceed a step further than is necessary for mutual security and protection from foreign enemies." Even such examples of interference as national education and state relief of the poor are to be condemned. This political theory of non-interference received a decided stimulus from its false analogy with the doctrine of popular sovereignty. It was but natural that at the beginning of modern democratic government the idea of the right of the nation to govern itself should be confounded with the somewhat similar claim of the individual to be left alone to manage his own affairs. Political freedom and non-interference seemed synonymous terms. In America the idea of individual rights was dominant during the formative period of the republic. The original situation of the colonists, compelled to wring their sustenance from a reluctant wilderness, the discredit of government in general by the land fees, quit rents, and tea taxes of the royal régime, inspired the Americans with an intense belief in self-reliance and individual rights. We find it as the central feature of the political philosophy of Thomas Jefferson, and the writers of the period,[1] and it has persisted until to-day in the opinions held by a large section of the people of the United States.

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[1] An excellent critique of the individualism of the eighteenth century, and its transmission to the nineteenth, is found in Michel, *L'Idée de l'Etat* (introduction and bk. iii).

[2] See above, bk. i, chap. v.

The individualistic theory of governmental non-interference resting on a doctrine of individual rights has an attractive and undoubtedly plausible appearance. Its weak point lies in the fact that on closer examination it is seen to contain inconsistencies of a serious character. To carry it out fully and absolutely would involve the adoption of an attitude at variance with the dictates of common sense, and one which no government has ever found it practical to completely accept. Mill has shown that the limitation of the province of government to the prevention of force and fraud "excludes some of the most indispensable and unanimously recognized of the duties of government."[1] Every government recognizes and enforces the right of private property, but it can be objected that this, in the case at any rate of property in land, looks very much like positive interference, since the maintenance of the claim of one individual is equivalent to the exclusion of all others. In the case of the regulation of the right of bequest, the fact of interference, though universally approved, is still more evident. In matters such as the coining of money, and the conduct of the postal service, we have instances of governmental action in a positive direction of such obvious convenience and general utility as entirely to warrant the violation of individual liberty involved. In other cases, as has been shown in detail by Professor Sidgwick,[2] there is an obvious breach of public morality in a policy of complete abstention; that a government should leave deserted children to starve, and content itself with "not interfering" with the destitute poor, is a point of view that meets with almost universal condemnation. The positive duties of the state in regard to national education are also generally admitted, although it is hard to find a defense for such a function of government on a purely individualistic plan.

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[1] See C. E. Merriam, *History of American Political Theories.*

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[1] John Stuart Mill, *Principles of Political Economy*, bk. v, chaps. i and xi.

[2] Henry Sidgwick, *Principles of Political Economy*, bk. iii, chap. ii.

3. Based on a Theory of Profitability; the Doctrine of Laissez Faire. The view that social justice demands that the individual should be left in possesssion of his "natural rights" may therefore be discarded. Far more importance has attached to the economic defense of individualism, the claim that it is more profitable for the welfare of industry and commerce that every one should be left to follow his own interest as he himself understands it. This is the doctrine that was paramount in England during the rise of modern industrialism and which was to a large extent reflected in America and elsewhere. The cause of the peculiar dominance of individualism in the direction of economic policy is to be found partly in the industrial circumstances of the time, partly in the effect exercised upon public opinion by the writings of the political economists. During the period between 1750 and 1850, England, and in consequence the industrial world, underwent a series of economic changes of such fundamental importance as to earn the name of the Industrial Revolution.[1] The invention of special machinery for the textile industries (the spinning jenny, the mule, the power loom, the cotton gin), together with the application of steam as a motive power, changed the system of production from its previously restricted and domestic character and established the factory system. The contemporary improvements in the smelting of iron ore (coal being used as fuel), the improved means of transportation in the shape of better roads, canals, and later the introduction of steamboats (1807), the building of railroads (1830) enormously increased productive power and stimulated international exchange of products. At the same time the existing system of government regulation of industry (the tolls, duties, prohibitions, labor statutes, etc.) became entirely out of harmony with the industrial situation and with the need for mobility of capital and labor and opportunity to exploit foreign commerce.

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[1] The student may with profit consult in this connection Toynbee's *Industrial Revolution*, Cunningham's *Growth of English Industry and Commerce*, and Hobson's *Evolution of Modern Capitalism*.

The inadequacy and to a great extent the positive hindrance of the older system of state interference became apparent and contributed directly to the rise of modern political economy. Adam Smith in his "Wealth of Nations" (1776), followed by Ricardo, Malthus, Frédéric Bastiat and others, elaborated the economic system of individual liberty as the new guide of legislative policy. The fundamental argument of their system runs as follows: Every man is actuated in his economic relations mainly by the pursuit of his own interest. If individuals are left free to follow their own choice in the use of their capital, the sale of their labor, or the renting of their property, the liberty of each will be in the general interest of all. For capital and labor will by this means be directed to those operations in which they are most profitably employed, and in which the remuneration for them is in consequence the highest. A similar reasoning applies to prices; for if articles are freely exchanged, an increased demand for any commodity will tend to raise the price and to call forth an additional supply, until by the operation of these balanced forces an equilibrium is obtained. International exchange of goods, if left unrestricted, will be effected in the quantity and kind most profitable to those making the exchange: every country will prefer to direct its labor towards the production of those articles for which it has the greatest adaptability and will rely on its trade with other nations to supply the commodities whose production it finds relatively difficult. We have thus a general economic harmony in which every individual seeks to obtain the greatest advantage for himself to the general wellbeing of all. In such a state of things government interference becomes needless and necessarily noxious. To fix prices and wages by legislative act, to assign a legal rate of interest and prescribe a legal schedule of rent, to prohibit importation or hamper the movement of labor from trade to trade or from place to place,— all this is contrary to a natural law which if left to itself will coördinate everything to the best advantage.

The effect of this teaching throughout the world, but especially in Great Britain, was momentous. It led to the repeal (1813–14) of the long-standing regulation of labor under the Elizabethan statute. It occasioned the abrogation of the laws against free combination of workingmen (1824) and of the laws of settlement restricting the movement of laborers, the repeal of the navigation code (1849) which since the reign of Charles II had sought to limit the trade with British colonies to the ships of the mother country, and the abolition of the trade monopoly of the East India Company. It found its greatest triumph in the almost total repeal of the protective duties, the abolition of the corn laws (1846), and the establishment in the United Kingdom of the system of free trade.[1] In America, though the absence of positive interference in the past prevented the necessity of similar statutes of repeal, the same ideas exercised an enormous influence. The writings of earlier American economists reflect with what General Walker has called a "Chinese fidelity" the ideas of the English school; and the low-tariff movement before the war was based on the doctrine of free trade. In a succeeding chapter we shall have occasion to refer to the later criticism of natural liberty.

4. Based on a Biological Analogy: the Survival of the Fittest. The evolutionary basis of the individualistic theory of governmental functions has not enjoyed the same prominence as the economic doctrine. We see it especially in the political philosophy of Herbert Spencer. As we have already noticed in connection with the organic theory of society, Spencer endeavors to apply the biological theory of evolution to the interpretation of social and industrial progress. The government is regarded as one of the "organs" of society. It should be intrusted only with that function for which it is specially adapted; and with the advance of social complexity it must lose in scope what it gains in intensity. "A function to each organ, and each organ to its own function," says Spencer, "is the law of all organization. . . . The lungs cannot digest, the heart cannot respire, the stomach cannot propel blood. . . . Must we not expect that with government also, special adaptation to one end implies nonadaptation to other ends?" Spencer, in his earlier writings at any rate, was willing to follow his theory to its logical outcome, and to erect the dogma of "the survival of the fittest" into a moral law. To interfere with its operation was to disturb the "natural" order of progress. Should the state aid the poor, the sick, and the aged, it thereby contributes to the survival of forms which have no claim to survive, and whose existence is a detriment to life in general. "It seems hard," he says, "that a laborer incapacitated by sickness from competing with his stronger fellows should have to bear the resulting privations. It seems hard that widows and orphans should be left to struggle for life or death. Nevertheless when regarded not separately, but in connection with the interests of universal humanity, these harsh fatalities are seen to be full of beneficence." The theory thus advanced is interesting as illustrating the extreme form which individualism was apt to assume during the period of its dominance, but hardly needs a detailed refutation. Such an argument would apply equally well to the suppression of private charity, private aid to the sick, and private maintenance of the poor as well as to government relief. If the sole test of fitness to survive is found in the fact of survival, then the prosperous burglar becomes an object of commendation, and the starving artisan a target of contempt. If it is assumed that widows will die unless the government helps them, and that usurers will grow rich unless the government stops them, this seems a very poor reason for saying that widows *ought* to die and that usurers *ought* to grow rich. Even taking the evolutionary argument on its own ground, it can be urged with justice that as soon as the government does "interfere," then its interference becomes one of the facts of the situation, one of the operative forces to be taken into account. Indeed the attempt to thus apply the biological doctrine of evolution to the theory of the functions of government involves a distortion of the truly scientific point of view.

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[1] A. Mongredien, *History of the Free Trade Movement.*

5. Conflicting Forces. Even in the first half of the nineteenth century, when the individualistic view of government was dominant in both theory and practice, its doctrines were not altogether unopposed. The wonderful progress made in productive industry by the factory system operating under a régime of natural liberty seemed the strongest possible argument in its favor. As against this the appalling distress of the working classes during the same period plainly called for a more active policy on the part of the state than mere non-intervention. The factory system under the play of free contract seemed inevitably to lead to oppressive hours of labor, unwholesome and brutalizing conditions of work, and the employment of children of immature age as a substitute for adult labor.[1] The degradation and insufficient remuneration of the workers as a consequence of their enjoyment of "natural liberty" called forth a strong current of opinion in opposition to the policy of non-interference. Thomas Carlyle in his "Past and Present"

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[1] An account of the miseries occasioned by the factory system may be found in Spencer Walpole's *History of England*, vol. iii, chap. xiii.

(1843) and "Latter Day Pamphlets" (1856)[1] denounced the "dismal science" of the economists and ridiculed the doctrine of *laissez faire*. The practical effect of this humanitarian movement is seen in the legislative regulation of factory labor in Great Britain by acts of Parliament of 1833, 1844, 1847, 1850, and later statutes. These measures which limit the hours of employment for women and children are flatly at variance with the individualistic principle. They have however been subsequently imitated in the legislation of the great industrial states, including most of the manufacturing states of the American Union. The further disintegration of the principle of non-interference will be traced in the third chapter. From what has been said, however, it may safely be concluded that pure individualism in the conduct of government is impossible. Its adoption, in complete form, runs counter to the most instinctive impulses of humanity and would neglect governmental duties of the most evident character. As a matter of political justice it rests on a mechanical attempt to completely divorce individual and social rights. On an economic basis it overlooks the plain advantages of coöperation and regulated effort. As a scientific law it will not stand examination.

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[1] "Let us hope that the leave-alone principle has got its apotheosis.... Respectable Professors of the dismal science, your small 'Law of God' is hung up along with the multiplication table itself . . . the length of your tether is pretty well run." *Latter Day Pamphlets*, No. i.

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CHAPTER II

SOCIALISM

1. The Socialistic Theory: its Destructive Criticism. — 2. The Constructive Programme of Socialism. — 3. The German Social Democrats. — 4. Socialism in England and America.

1. The Socialistic Theory: its Destructive Criticism. Entirely opposed to the individualistic conception of government are the doctrines known as socialism, collectivism, communism, and which, subject to later distinction, may be spoken of together as the socialistic theory of the state. No socialistic state has actually existed on any except a small and experimental scale. Socialism is therefore mainly an ideal rather than an actuality. But the doctrines it embodies have appealed so strongly to so many minds, have exercised such an important influence on actual legislation and practical politics, and contain in spite of their fallacious nature so much that is of use and inspiration, as to merit a special treatment.

Socialistic theories present both a destructive and a constructive aspect. They offer in the first place a criticism of the existing industrial system (whose basis is individualistic), with a view to show its inherent unsoundness and its inevitable collapse. In the second place they propose to substitute for the present state a coöperative commonwealth to be founded on associated effort and joint control. The critical part of the socialistic doctrine is intended to show that the individualistic system of industry is wasteful and ineffective from an economic point of view, and inequitable in that the remuneration which falls to the different classes of workers is not according to their relative deserts. The more celebrated writers of the school, as for instance the great German socialist Karl Marx in his "Capital," which has been called the gospel of socialism, criticise the existing state from a point of view elaborately historical. Mark alleges that the system of individual private property on which it rests is the outcome of original aggression of the strong against the weak, representing an appropriation of the means of existence by the stronger class, and their consequent exploitation of the mass of workmen, who remain in a state of dependence spoken of as wage slavery. The progressive improvement of the means of production renders the workmen more and more dependent on those who employ them. The appropriation of the land by private owners (a process practically complete in older countries) renders it impossible for any individual to apply his labor directly to the natural resources of the earth. The increasing use of machinery, although vastly more efficient than the hand labor which it has replaced, makes all productive operations more and more dependent on the possession of capital, on the ability to purchase machines, premises, etc., and to forego the prospect of immediate reward for the sake of future profit. In such a condition of things the isolated laborer has nothing whereon to subsist except his labor power, which he must sell as best he can to the highest bidder. In the nature of things he cannot receive less for it than what will enable him to barely exist, but anything over and above this will depend on the bargain he is able to make with his employer. Now this bargain, although nominally effected under the rule of free contract, is in reality a forced one. The workman must sell his labor or die of starvation. But since the increase of population, as Malthus and others have shown, is continuous until some point where it is actually checked by lack of means of subsistence, the labor market will always be so crowded with laborers as to bring down the level of wages to that which practically amounts to the necessaries of life. Should wages rise above this, a responsive upward movement of population must bring them down again. Such is the famous "Iron Law of Wages" formulated by Lassalle on the basis of the Ricardian economics. The other side of the industrial bargain is represented by what the employer receives from the laborer. This consists each day of a certain amount of labor power, which results in the fabrication of a certain number of useful commodities produced by the application of the day's labor. From the nature of the bargain it does not follow that the commodities thus produced by the workman's labor need be exactly equivalent to the commodities given to him through the medium of his wages by the employer. Indeed, the socialistic writers assure us the two are by no means equal. The workman produces in the day more than he consumes (for otherwise the employer would have no motive in undertaking production), and the surplus thus created falls to the lot of his fortunate employer. The laborer who sells his labor under compulsion is compelled to submit to this fraudulent system. Such is the doctrine of surplus value, which is particularly associated with the name of Karl Marx, and which is the foundation of the critical theory of socialism. The point in which it lies open to attack is that it attributes to labor the whole of the productive result, and does not allot a share to the machine which was used in coöperation and which is the property of the capitalist.

It is impossible here to enter into the economic discussion to which this question gives occasion. It is only intended to show on what grounds the socialistic contention accuses the present system of being essentially inequitable. Marx and the writers who have followed his lead are not content with alleging the present unfairness of the method of free contract and free competition. They claim that with the continued application of machinery and improvement of production, the continued appropriation of natural resources and constant growth of population, the inequity of the system will be emphasized, the gulf between the capitalists and the laborers, the rich and the poor will be further and further increased. Sooner or later, they maintain, the forces thus at work will precipitate a vast social catastrophe which can only be avoided by altering the industrial basis of our social system, and substituting associated effort for the economic anarchy of free competition. Their theory thus assumes the aspect of a social prophecy.

On more valid grounds the socialists draw attention to the wastefulness of the individualistic method of production and distribution. A vast amount of work is performed under it that has no social utility, a great deal of work is duplicated and even done several times over with no general advantage. The labor wasted in competitive advertising, and efforts of a similar character intended merely to divert business from one person to another, is the most conspicuous instance of economic loss of the first class. Instances of work that is needlessly multiplied are seen in the case of competing railroads running trains over parallel lines, and in retail stores existing in considerable number where one general distributing establishment could do the work. Perhaps the simplest and best illustration of the point in question is seen in the contrast between the delivery of letters at consecutive houses and in neighboring streets by a postman (an official under collective management) and the waste of time and labor involved by the spasmodic delivery of milk and groceries at various houses throughout an extensive district by the employees under individual management. It is in the economic saving thus effected that the amalgamation of industry by large corporations proves economically superior to production and distribution by small concerns. The large industrial companies and departmental stores of the present are standing proof of the fact. These the socialists regard as indicating the necessary passing of the older system of individualism, the large corporations representing a transition stage towards the general industrial management by the state.

2. The Constructive Programme of Socialism. From what has been said it will be easily seen that the critical or destructive side of socialistic theory contains a great deal that is true and extremely useful in indicating the proper direction of measures of social reform.

The other side of socialism, its constructive programme for a coöperative commonwealth, is much weaker and cannot be worked out in detail without meeting with hostile criticism from socialists themselves. In general terms the programme of socialism is to substitute government management for private management, to put all productive industry under state administration, thus making the state the sole employer, and putting all the workers in the employ of the state. On this system the functions of government would extend to the whole domain of economic operations; it would manage all the railroads, the factories, the mines, and the farms. In place of competing retail stores, government distributing houses would be established for delivering to each citizen his share of the national production. Individuals would still have a property right to the things they actually intended to use, — houses, food, clothes, etc., — but all the means of production would be nationalized.

The inherent impracticability of such a system becomes evident when one turns from the general scheme of production to the question of distribution, — the method according to which the wages of the workers under the socialist state are to be managed. On this point there is a great variety of opinion. The most extreme view is found in those writers who recommend that everything produced should be common property, all persons taking from the general stock according to their needs. *La mise au tas, la prise au tas*, ran the formula adopted by Proudhon, the French anarchistic writer. Such a system would of course leave no such thing as individual wages, the remuneration of each laborer being according to his needs, not according to his efficiency. Somewhat similar to this is the suggestion for a general equality of wages, all persons being compelled to work for an equal number of hours (or a number of hours equalized according to the relative attractiveness or repulsiveness of the trade) and all receiving the same remuneration. This, it will be remembered, is the solution of the wages problem offered by Edward Bellamy in his "Looking Backward," a presentation of the socialist state under the form of a romance, which attracted at the time of its publication (1888) a phenomenal attention. To all except the most sanguine visionaries any socialistic scheme involving equality of wages is totally impracticable. It is evident that under such an arrangement the individual stimulus to work would be gone and the efficiency of production hopelessly impaired by idleness. Bellamy and others attempt to argue that under the improved conditions brought by socialism, the elevation of the general moral tone would severely discountenance any such shirking of work, and that with the shortened hours of labor possible under coöperative work there would be no aversion to labor on the part of the individual. Such an argument is altogether of an idealistic character, and contains the most monstrous assumptions of a sudden and mechanical renovation of human nature, so sweeping as to beg the whole question of social reform. The argument is also in contradiction to the method (adopted by Bellamy) of lengthening or shortening the hours of labor in any trade in order to attract or repel workers according to the needs of any particular moment. This plan itself rests on the assumption of an aversion to work.

We come finally to the scheme of industrial organization that may be described as socialism proper, in opposition to communism and collectivism. In this case wages are to be awarded to each laborer according to his efficiency. The plan supposes a hierarchy of officials (on the elective principle) who control the productive process, drafting the workers from trade to trade as may be needed, and paying salaries, making promotions, etc., according to the industrial efficiency of the workers. The pay of a good workman would be high, of an inefficient or idle workman low. The scheme would be almost perfect, if one could assume the official persons who assign places, salaries, and promotions to be omniscient and impeccable. But the possibilities of corruption, the play of interested motives, intrigue, personal spite, and unfairness of all kinds would be so appalling under present conditions of public morality as to altogether remove such suggestions from the domain of the practicable. If all industry were forcibly appropriated by the government and private business prohibited, the individual who fell under the odium of the "bosses" and "cliques" that might very possibly control such a government, would feel himself to be under a despotism from which the organization offered no escape.

3. The German Social Democrats. Socialism, however, has more than a merely theoretical aspect. On the continent of Europe it has made itself a force in practical politics of the highest importance, and socialist political parties have of late assumed some importance in England and the United States. But it is in Germany especially that the socialist propaganda has met with success, and has exercised a powerful influence on the legislative policy of the government. The evolution of socialism in Germany is not only interesting of itself, but is singularly instructive in the light it throws upon the probable future of socialist political parties, and the extent to which they are likely to succeed in modifying the attitude of existing governments. It arose, as also in France, in the earlier part of the nineteenth century, assuming at first an altogether ideal and utopian form.[1] The earlier socialists, or communists as they were at first called, greatly underestimated the enormous difficulties that stand in the path of social reform. Attributing all existing evils to the prevalence of the capitalistic system, they presumed that its immediate abolition in favor of state control would effect an almost immediate regeneration of mankind. The original programme of socialism, when it arrived at the stage of having a political programme, consisted in the uncompromising destruction of capitalistic industry. This was the attitude of the socialist wing of the revolutionists that for the time being overthrew monarchical government in France in 1848, and threatened its existence in the German convulsions of the same year. After the collapse of that great movement the German socialists fell into opposing groups, — some of them still aiming at a general universal revolution, and attempting to organize on a cosmopolitan basis, others recognizing the present national state as their starting-point, and desirous of gaining their ends by constitutional reform.

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[1] Of the initial period of modern socialism in Germany, Weitling's *Die Welt wie sie ist und sein soll* (1838) and in France the writings of St. Simon and Fourier may be cited as illustrative.

By the latter plan socialism, instead of fighting itself into power, would vote itself into power. The greatest influence during this period was exercised by Ferdinand Lassalle, who organized a German Workingmen's Association, and advanced as an immediate programme the use of state credit for the foundation of workingmen's productive associations, which should act as the beginning of a socialist state. The secession of the revolutionary anarchists, the collapse of the international aspect of the movement,[1] aided the growing tendency of German socialism towards a national constitutional form whose immediate aim should be the attainment of practical measures, rather than the complete realization of the ideal state. At a congress at Gotha in 1875, a general union of the socialist party was effected on a basis of compromise. In the programme there adopted the "abolition of the system of wage labor" was indicated as the ideal of socialism, but certain immediate measures were proposed "in order to prepare the way for the solution of the social question."

In the period following (1878–1890) the party underwent a severe persecution at the hands of the German imperial government, which did not, however, drive it into revolutionary measures. At a congress held at Erfurt (1891) a revised platform was adopted, which became the official programme of the German social democratic party. It demands universal, equal, and direct suffrage by ballot (extending the franchise to women), proportional representation, direct legislation, substitution of a universal militia for a standing army, freedom of the press and of meeting, free justice, a graduated income tax, improved factory legislation, statutory limitations of the hours of labor. With these immediate demands are coupled a general denunciation of the evils of capitalistic industry. But it is asserted that the "struggle of the working classes against capitalistic exploitation must of necessity be a political struggle,"[1] and it will be seen that the present demands of the party include nothing that is not asked by various radical groups in Anglo-Saxon countries, except perhaps the item of a legal labor day. On this basis the progress of the Social Democrats in point of numbers has been extremely rapid. At the foundation of the German Empire they elected only two members to the Reichstag; in 1893 they elected forty-four members, representing 1,876,738 votes, and in the election of 1903 succeeded in returning eighty-one members, representing 3,011,114 votes. On the other hand it is generally conceded that the socialist party (including therein those who vote for socialist candidates) is not entirely made up of socialists. It has become to a large extent the party of discontent and of standing opposition to the imperial government, and is by no means to be looked upon as entirely made up of persons believing in the practicability of a coöperative state.

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[1] Karl Marx in 1864, while a refugee in London, founded the International Workingmen's Association, which aimed at social revolution without the help of existing governments; the movement collapsed after the Franco-Prussian War.

In all the Continental countries one of the vexed questions of present socialism is the extent to which the earlier doctrines of the socialistic theory are to be maintained. Some of the socialists tenaciously adhere to the original tenets of Karl Marx, and persist in believing in the imminence of the social cataclysm. This, however, in view of the evident improvement in the lot of the working classes during the nineteenth century, during which the actual wages of skilled labor have been about doubled, is an expectation that seems belied. A great many socialists believe in the progressive alteration of present conditions with a view to immediate social amelioration to the extent actually practicable. These "revisionists," as they are called, were voted down at the recent international congress of socialists at Amsterdam (1904), and a set of resolutions adopted reaffirming the inveterate hostility of the socialists to the system of capitalistic production. But in spite of this it may with authority be affirmed that the greater number of socialists now favor the amelioration of present conditions rather than their complete overthrow. The socialists, though extremely numerous in France and Italy, have nowhere else as much cohesion and unity of operation as in Germany. In France in particular they are divided into opposing factions. Some of them, under the name of "collectivists," are of the Marxian type, favoring a complete economic control exercised by a centralized government; others advocate the adoption of a socialistic programme by the development of municipal control; others again, the "possibilists," are inclined to accept any measures of amelioration that can be obtained and to coöperate with any existing governments that will meet their views.

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[1] A translation of the text of the Erfurt programme may be found in Ely's *Socialism and Social Reform*, appendix i.

4. Socialism in England and America. Various socialistic associations have been formed in England, — the Social Democratic Federation (1881), the Socialist League (1884), now extinct, and the Fabian Society. The latter has contained among its members many persons of marked talent, — the two Webbs,[1] Mrs. Annie Besant, and others,— and the collection of papers published by it under the title of "Fabian Essays in Socialism" has had an extensive sale. The programme of the society consists in the gradual introduction of socialism, recognizing the need of a transitional stage in passing from capitalistic industry to collective management. In the United States there have been numerous examples of practical attempts at the realization of collective management in the foundation of various communities in which the principle of associated labor and common ownership was adopted.[2] Of these the Rappites of New Harmony (later of Economy) and the communists of Zoar, Amana, and Oneida are familiar examples. These experiments have always proved failures, except where the main motive was religious and not economic, and where the community of property was only incidental to aspirations of a higher character. Of late years socialism has appeared in the United States in the form of political parties which are developing a considerable voting power. The Socialist Labor party and the Social Democratic party are the most important. In the presidential elections of 1904 some 600,000 votes were given to socialist candidates. But in the case of both these parties, though they preface their platforms with general statements in favor of the nationalization of production, special stress is laid on the immediate demands for state railroads, municipal control of lighting plants and street cars, a graduated income tax, etc. They thus illustrate in their practical programme a very close similarity with radical political parties whose basis is not socialistic. The present demands of socialist parties both in America and in Europe are very closely allied to those advanced by the Populists, the French Radicals, and the British Independent Labor party. The fundamental basis of radicalism is individualistic and hence represents in theory the opposing extreme from the socialistic conception of the state. But the progressive evolution of modern socialism is carrying it further and further from its original ideal. The latter many socialists admit to be utopian and unattainable, and many persons not socialists would concede that the theoretical ideal of a coöperative commonwealth may exercise a formative influence on the direction of actual legislation. The aims of the socialists in connection with municipal government we shall discuss in the next chapter.

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[1] Sidney and Beatrice Webb, well known as joint authors of *History of Trade-Unionism*, etc.

[2] Consult in this connection Charles Nordhoff, *The Communistic Societies of the United States.*

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CHAPTER III

THE MODERN STATE

1. The New Environment. — 2. Theory of Protection to Industry. — 3. Modern Protective Tariffs. — 4. Interference with Competitive Prices; Trust and Railroad Legislation. — 5. Government Interference on Behalf of the Working Class; Factory Laws, State Insurance, and Pensions. — 6. Municipal Control.

1. The New Environment. We shall now consider in conclusion the actual functions exercised by modern governments and the existing state of opinion in reference to the economic duties of the state. The practical operation of all modern civilized governments remains, in a certain sense, on an individualistic basis. By this is meant that there is no state in which the principle of common property in the means of production, or of equality of wages, or of universal employment by the government, is adopted. Each individual is still left to earn his own living by his own efforts, and the amount of wages remains as a matter of free contract between employers and employed. But subject to this general reservation, it can easily be shown that the practice of modern governments is further than ever removed from complete individualism, and that the tendency towards state interference with industry is everywhere on the increase. We have but to consider the public policy of our time in reference to the regulation of railroads, of monopolies and tariffs, to realize that the former reliance upon the principle of unrestricted competition and individual self-interest has been completely lost. This obvious change in public policy has been accompanied by an equally evident change in public opinion. The economists and political philosophers of the present time are prepared to defend a degree of state interference quite at variance with the doctrines of their predecessors. The reason for this remarkable alteration both in theory and practice is found in the altered circumstances of our industrial environment. We have seen in a previous chapter that the rapid expansion of industry under the stimulus of the new mechanical processes of the industrial revolution seems to demand its liberation from all forms of governmental restraint, and that the consequent removal of the standing impediments to the free movement of capital and labor was accompanied, at any rate as far as the total volume of production was concerned, with marked success. But it has been seen also that in reference to the welfare of the laboring class the system of free competition, particularly in regard to the work of women and children, was open to serious objection. The further development of modern industry has emphasized many other disadvantages attendant upon unrestricted competition. The more important of these may be briefly discussed in theoretical form, after which we shall proceed to the treatment of the actual legislative policy adopted under the circumtances.

The theory of government functions laid down by Smith, Ricardo, and the classical economists was essentially a cosmopolitan theory. It was intended to show that if wages, prices, and trade were left to the free play of individual bargaining, the self-interest of each would promote the general interest of all. Each individual would be enabled to apply his labor and his capital to the particular branch of industry in which he might expect the highest remuneration. In the same way each nation would be enabled to concentrate its production in the directions for which it had the greatest natural advantages, an unrestricted trade with its fellow nations supplying the commodities not produced at home. As applied to the conditions prevalent in England in Ricardo's day, the theory of international relations is generally admitted to have been correct. There could be no doubt as to England's paramount advantages at that time in nearly all lines of manufacturing industry. But the attempt to apply the free-trade theory to other nations and to later times has by no means met with a general acceptance. In the first place it is objected that the acceptance of the policy of free trade militates against national self-sufficiency and independence. In strict accord with the Ricardian doctrine it will follow that if a nation has especial advantages for agriculture and relatively poor facilities for manufacture it will, apart from government interference with the "natural" course of things, rely upon its neighbors for manufactured articles, and devote its energies mainly to agriculture. Conversely a nation with special facilities for manufacture, but poor in agricultural resources, will be led to leave its land untilled and to obtain its food-supply by exchanging its manufactured articles for agricultural products. It is clear that in these cases the welfare of each nation is absolutely dependent on its being able to carry on an uninterrupted trade for the supply of its particular needs. Should such intercourse be interrupted by war, either between itself and the nation it trades with or between the latter and an outside power, its economic existence is at stake. The economic gain afforded by its trade in time of peace is thus offset by its economic feebleness in time of war. It is to be especially observed that it is not only a war of its own that it must apprehend, but a war undertaken by an outside nation on which it is in some degree economically dependent. On this ground it is argued that state interference in the shape of protection to manufactures (or to agriculture) is justified in so far as may be needed for establishing a proper quantity of economic independence. Even Adam Smith in his approval of the navigation acts[1] admits the validity of considerations of a similar character, and the argument is generally admitted by present economists to be of weight. There is a considerable divergence of opinion as to the extent to which economic independence should be attempted. It is, however, universally admitted that for the manufacture of the munitions of war no state should permit itself to be dependent on the outside world.

2. Theory of Protection to Industry. The foregoing is only one of the many grounds on which state interference in the form of protective duties has been advocated. More familiar, especially in America, is the line of reasoning known as the "infant industry" argument. It is claimed that the resources and circumstances of a country may be such that while the initial expense of setting a manufacturing system on foot in the face of foreign competition offers insuperable difficulties for the industrial producer, yet such a system once properly established would be of a sufficiently profitable character to compete on equal terms with the imports of foreign manufactures. In this case, it is urged, the government should impose a temporary duty which may make it possible for manufactures to be established, and which may later on be removed. The temporary help thus afforded by state interference will enable the community to advance to a higher stage of industrialism, and better to exploit the natural resources of its territory. This argument has met with especial support from American economists. The weak point in connection with the infant-industry argument is that in countries where duties of this kind have been adopted, the industries in question have never outgrown their infancy, as far as the protective tariff is concerned. In practice the duties have not only not been removed but have been increased.

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[1] *Wealth of Nations*, bk. iv.

A further ground of argument in favor of protective interference arises out of the cosmopolitan character of the free-trade doctrine. Assuming a complete international régime of free trade, the system might tend towards the denudation and impoverishment of the less favored nations in favor of those possessing the greatest resources and offering the best conditions for manufacture. The Ricardian theory presupposes that each nation will occupy itself with the pursuits for which its circumstances are best suited. It is admitted[1] that one nation may be worse suited in every respect than another and yet continue to trade with it, because the people of the most favored nation will prefer to devote themselves to the occupation in which their advantage is greatest. Thus let us suppose that Portugal can produce both wine and corn with less labor than Morocco; and let it also be supposed that in the production of corn the advantage is but slight, whereas in the case of wine the advantage is enormous; the people of Portugal will still prefer to get their corn from Morocco, although produced there at greater pains than in Portugal, because the quantity of wine they exchange for it is produced at still less cost. On this ground the classical economists undertook to show that two nations might trade with mutual advantage even where the resources of the one were superior in every respect to those of the other. Such an argument however takes it for granted that the capital and labor of each country will remain within its own borders, and not emigrate to the more favored territory. Why should it not be supposed that with free intercourse and open markets, the capital, and what is far more important, the laborers of less favored communities would emigrate to places better suited for manufacture? It will be noted that this supposed denudation of poorer countries contains nothing at variance with the free-trade theory itself. The emigration of persons and capital under these circumstances would doubtless increase the gross total of the world's production, and would add something to the general productive efficiency of mankind. But it would assuredly not increase the gross total of the productiveness of the country out of which they emigrated. The question then is, whether the adoption of protective duties in aid of home manufacture can prevent the desertion of poorer for richer countries. It may be argued that, even after the duties are imposed, the individual capitalist or laborer will still find it more profitable to use his capital and labor in the more favored country, and that the tendency to emigration of both of these is independent of protective interference. There are, however, a great many people in every country whose remaining there is not altogether a matter governed by economic motives; some will remain from sentimental reasons of attachment and patriotism, others because their material fortunes are already amply sufficient. Under a protective system the manufactured commodities consumed by these persons must needs be made at home and necessitate the continuing within the state of a sufficient manufacturing population for the purpose. Such manufacture will, under these premises, be conducted at an economic loss: the persons of means thus residing in the country will have to pay more for what they consume than if content to import it from abroad and to let the manufacturing population depart. But the upshot will be that a larger number of citizens remain within the state than would have remained without the state interference in the form of protective duties. It is plain, of course, that the applicability of such an argument depends on the particular circumstances of any country at any time. The situation of Great Britain at the present time naturally suggests itself for examination in this connection. It may conceivably be the case that the facilities both for agriculture and for manufacture are now inferior in Great Britain to those of the United States. The progressive application of water power and electricity as motive forces may further emphasize this advantage. Under such circumstances according to the Ricardian doctrine the laboring people of England ought, each consulting his own advantage, to come to live in the United States. There would remain in England the persons of means, who would invest their capital in the manufacturing industries of America, and draw from that continent the various commodities of their consumption. The case is purely hypothetical and may be perfectly at variance with present facts. But it seems to show that, in pure theory, the system of free trade is not *of necessity* identical with national greatness. To grant this and to contend that it is always consistent with the general welfare of the world, even where fatal to the welfare of a particular nation as such, would be thought by many a quite insufficient argument.

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[1] See John Stuart Mill, *Principles of Political Economy*, bk. iii, chaps. xvii, xviii.

3. Modern Protective Tariffs. Acting on the general considerations thus stated, almost all of the modern industrial states have seen fit to adopt a system of protective duties for the promotion of domestic manufacture. Such legislation in the United States was indeed adopted in a mild form at the very opening of the history of the present Constitution.[1] During the first half of the nineteenth century, the rival theories of free trade and protection struggled for mastery. The high tariff of 1828, the "tariff of abominations," was followed by the greatly reduced tariff of 1846, a measure partly due to the influence of the free-trade campaign in England, and by the reciprocity treaty with

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[1] See Schouler, *History of the United States,* vol. i; Taussig, *Tariff History of the United States.*

Canada in 1854. But since the Civil War the system of protection to national industries has been strengthened, and extended to practically the whole range of industry. The Dingley tariff of 1897, while admitting free of duties a large number of raw materials for use in manufacture, imposed on manufactured articles duties amounting in some cases to more than fifty per cent. The Dominion of Canada, though granting a special rebate of one third of the duty to imports from Great Britain, is now on a high-tariff basis, the policy of protection having been explicitly adopted by the Conservative party in 1878, and transmitted to their opponents on their accession to power in 1896. The German Empire, since the tariff of 1879, has also adopted the policy of protection, the recent tariff of 1902 having further raised the existing duties, especially those on agricultural products.[1] France, Italy, and the other Continental countries are also under a system of tariff protection. Of the manufacturing countries of the world, Great Britain alone remains upon a free-trade basis, while even there the future retention of such a system has recently become a subject of acute controversy.

4. Interference with Competitive Prices; Trust and Railroad Legislation. Interference with the freedom of importation is only one instance of the present tendency towards legislation in contravention of the formerly dominant theory of natural liberty. We have already seen that in accordance with this system it was considered advisable that prices should be left altogether to the play of free competition among buyers and sellers. It was presumed that under a régime of unrestricted competition, the price of any article would be in proportion to the cost of producing it. For the attainment of the maximum economic efficiency, and for the satisfaction of the demands of social justice, it seemed necessary merely to leave people alone to buy and sell as they pleased at such prices as they should arrange between themselves. The essence of the position, however, lay in the assumption that there would be active competition among a number of persons producing the same article. The case is altered if we suppose the entire stock of any particular commodity in the hands of a single seller, or what is the same thing, in the hands of a group of sellers acting in concert. Where a person has a monopoly of the available stock of a commodity, there is no reason, in and of itself, why he should sell it at a price representing the cost of production, rather than at any other price. He is free to ask any price that he likes, subject always to the consideration that if he asks too high a price no one will buy the article he wishes to sell. When we come to inquire how prices will in such a case be settled, we find that a monopoly price follows a law quite different from that governing prices under free competition.[1] The adjustment of a monopoly price may be explained as follows. The seller obviously cannot sell below the cost of production, because that would entail a direct loss. He must, therefore, sell at a price somewhere above the cost of production. But it is clear that the lower the price the greater will be the number of articles that he sells. The whole amount of his profit will depend, therefore, on two factors, the total number of sales and the amount of profit on each sale. As the price rises the number of buyers decreases, though probably not in a regular progression, but irregularly and in a jolting fashion. There will be found somewhere in the upward scale a point of maximum profit, at which the product of the number of sales multiplied by the profit on each is greater than at any other point. Now this point may in some cases be far above the cost of production: for example, in the case of an article of prime necessity, — bread, sugar, oil, etc., — any one having a complete monopoly of the available stock could exact a price much in excess of the actual cost of production.

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[1] See W. H. Dawson, *Protection in Germany*, chap. ix.

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[1] For the law of monopoly price, see R. T. Ely, *Monopolies and Trusts.*

In the economic situation of the earlier part of the nineteenth century, the monopolization of articles of ordinary production had not appeared to any great extent. The law of price applying to these conditions, though apprehended by the economists of the day, assumed no particular importance, nor did it seem to have any immediate bearing on public policy. But in our own day the possibility of monopolization of ordinary articles of production has become a significant factor in the industrial situation. To this, various causes have contributed. The increasing use of machinery renders the initial cost of embarking on any industrial process constantly greater. The evolution of the principle of joint-stock undertakings has rendered it possible to carry on production on a very large scale, and in consequence to considerably reduce the cost of each article produced. This has rendered it very difficult for small concerns to compete with large industrial corporations, and has set up in the industrial world a tendency towards the amalgamation of similar businesses under a common management. When this amalgamation has proceeded far enough to cover, or at any rate to dominate, the whole production of a certain class of commodities, then the principle of competitive price-making no longer applies, and the law of monoply price comes into play. To prevent this state of things modern governments have seen fit in some instances to use their legislative power. This is particularly the case with the United States, where the process of industrial amalgamation has been most rapid and has occasioned the greatest public apprehension. The federal government in 1891 passed an anti-trust law (known as the Sherman Act) forbidding contracts or combinations in restraint of interstate trade, prohibiting the monopolizing of any part of the trade between the states, etc. About half of the states have legislated against the trusts, either by constitutional provisions or by statutes. A great deal of such legislation has, however, been declared invalid by the courts, or rendered inoperative by various kinds of evasion.[1]

A special case of the interference of the modern state in regard to prices is seen in legislation concerning railroad rates, which are of course prices charged for transportation of persons and freight. A little examination will show that railroad rates differ from most other prices in a very peculiar way. We have seen that under free competition in the production of ordinary commodities their selling price will approximate to the cost of production. Even where a single seller has a monopoly he will find no advantage in making sales below the cost of production. But in the case of a service performed by a railroad in transporting passengers or freight over a certain distance the "cost of production" is of a quite different character, and stands in a quite different relation to the price demanded. In the first place we can see that there is very little, almost no expense incurred by the railroad for the particular transportation of any single article. Supposing that a train is scheduled to run between two stations, ten miles apart, the cost of sending a barrel of flour on it (the additional expense, that is, actually incurred by taking that particular consignment) consists merely of the labor of two or three minutes' handling and an infinitesimal quantity of extra coal by reason of the extra weight added to the train. It must be noted in the second place that as between a distance of ten miles and a distance of one hundred miles the cost is practically the same, for only the same amount of handling is needed, and the other expense is insignificantly small. There is of course the expense of running the train itself (coal, wages, etc.). Very obviously some of the prices charged for the passengers and freight it carries must make this good or the train is being run at a loss. But there is no reason (none, that is, of an economic character, and apart from ideas of sentiment, justice, etc.) why this charge should be levied in a proportionate manner upon the different consignments. Suppose, for example, that the state of the cotton trade is such that consignments of cotton will be sent even if the railroad charges a high price, and that the market for flour is such that no flour will be shipped except at a rate excessively low, it will clearly be to the advantage of the railroad to charge much for the one and little for the other. In other words each of these two rates will be of the nature of a monopoly price, the limitation of the charge being found in that above a certain point the number of consignments begins to fall off. Over and above the special expenses of running this individual train the railroad has to meet its permanent and standing expenses in the shape of the interest charge upon its original construction, and the cost of maintaining the roadbed and terminals. But there is no reason to assign these charges proportionately and uniformly among all the trains operated, and upon all the business handled. Each train and each consignment must of course repay the direct added cost which its operation entails. But above the extremely low minimum rate thus indicated, it is always worth while to accept business, even for a small charge where a larger cannot be had. In the practical levy of railroad rates it is therefore quite out of the question to distribute the total cost in a proportionate manner. Each service performed will be sold at a price representing "what the traffic will bear" and not what the traffic has cost. It will result in consequence that the different charges made by a railroad may be evidently and visibly out of proportion to their relative cost. It may happen that a greater charge is made for carrying a particular article a short distance than for carrying it a long one. Although at first sight this seems contrary to common sense and to common justice, it is quite in keeping with the principles we have just laid down. In transporting goods between two places five hundred miles apart a railroad may have to encounter the opposition of competing lines or of transportation by water, and may be compelled to accept a very low rate on the freight it carries. But at the same time there may very well be, included in this five hundred miles, a strip of one hundred miles which is not covered by any competing railroad, and which has not access to water transportation. As between the towns on this strip the charges that the "traffic will bear" are very likely greater than the utmost charge that can be levied on the through traffic of five hundred miles.[1]

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[1] For anti-trust statutes, see *Report of the U. S. Industrial Commission*, vol. ii. See also Ernst von Halle, *Trusts* (edition of 1900).

There is a further peculiarity in the economic situation of railroads in the fact that active and permanent competition between them is practically impossible. A state of keen competition induces the roads to reduce charges to a point which, while covering the actual and individual cost of the train service, makes no provision for the permanent interest and maintenance charges of the railway. In such a situation a poor road — particularly one whose interest charges are already in default, or which is even in the receiver's hands — is a stronger competitor than a good one, for it can indulge in a more reckless and suicidal rate-cutting. In practice, therefore, railroads have always found themselves compelled to enter into agreements, express or tacit, as to the regulation of their rates. From the point of view of the general public such understandings look very much like a combined attempt on the part of the roads to exploit the community for their own benefit.

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[1] For the theory of railroad rates see A. T. Hadley, *Railroad Transportation.*

The distinctive position which the railroads thus occupy in the industrial world has induced all modern governments to subject them to special regulation, and to entirely abandon in reference to them the principle of non-interference. In some cases, as in Prussia, Austria, Hungary, the states of the Commonwealth of Australia, etc., the state itself owns and operates the railroads. In France charters are granted to private companies for limited periods, after which the roads revert to the state. The chief railroad systems of the country (some 20,500 miles of road out of a total 25,500) will become national property between the years 1950 and 1960. Even while the roads are in private hands their general relation to the state is very different from that of ordinary business enterprises. A large part of the original permanent cost was defrayed by the French government; the government also guaranteed the payment of a fixed dividend. In return the rates are fixed by the government itself, and the transportation of the mails, troops, prisoners, etc., is made gratuitous. In the United States, although the railroads[1] have been left in private hands, they have been the object of special legislative control of both the state and the federal governments. The Interstate Commerce Act (1887) provides that in the case of charges levied on commerce between the states, no railroad company shall unduly discriminate in favor of particular persons or particular localities. The same law forbids the railroads to charge more for transportation for a shorter than for a longer distance over the same line, and prohibits the pooling of railroad earnings. The statute also establishes an interstate commerce commission of five members appointed by the President of the United States; it is the duty of this body to supervise the operation of the act, but it has no power of itself to punish violations of its provisions or to fix rates. The provisions of the federal anti-trust statute of 1891 have also been applied by the courts against the railroads in regard of various forms of combination that were presumed to be in restraint of commerce between the states. In addition to the national legislation most of the states have passed laws intended to prevent discrimination in freight and passenger rates, and to hinder undue combination. In most states also railroad commissions are established, in some cases with duties that are mainly advisory and statistical, but in others with coercive powers for the making and enforcing of rates. The Massachusetts board of railroad commissioners is an example of the first class; it supervises the operation of the law in reference to the issue of securities, receives reports from the railroad companies, and has an advisory power in regard to freight and passenger rates. In practice its recommendations have great force, and are usually followed by the roads themselves or embodied in statutes of the legislature. On the other hand, commissions such as those of Minnesota and of Illinois are given power to directly fix rates for traffic within the state.[1]

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[1] A full account of the railroad question in the United States is found in Professor Emory Johnson's *American Railway Transportation*.

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[1] It has been laid down by the United States Supreme Court that an exercise of power of this kind — the making of a rate by the commission itself — must be subject to revision in the courts.

In the United Kingdom there is also a commission for the supervision of the operation of railroads, established in 1873, and rendered permanent by an act of Parliament of 1888. The schedule of maximum rates of each railroad is subject to the approval of the Board of Trade. Pooling is not prohibited, but discrimination is against the law.

5. Government Interference on Behalf of the Working Class; Factory Laws, State Insurance, and Pensions. The attitude of modern governments towards the laboring class is in many respects no longer one of unqualified individualism. The general recognition of the idea of social solidarity and of aggregate social duties towards the workers and the poorer members of the community has profoundly influenced the legislation of our day. The original factory acts adopted in England, to which reference has been already made, have been imitated in all the great industrial countries, and expanded into an elaborate code designed to protect the wage-earner against the rigor of unrestrained competition. Legislation of this kind in the United States falls under state and not under federal jurisdiction. There are still many states of the Union in which, factory industry being but little developed, no protective statutes have been passed. But in Massachusetts, New York, Pennsylvania, Ohio, Indiana, Illinois, and all the great manufacturing states, factory legislation of a thorough-going character has been adopted. The factory acts of these states prohibit working people from being employed under conditions dangerous to health or life. They contain provisions for fire-escapes, prevention of explosions, fencing of machinery, ventilation, etc., and provide for the appointment of inspectors to supervise the operation of the acts. The hours of labor in the case of women and young persons are also limited by law. The labor of adult women is restricted in all the New England states (except Vermont) and in about ten other states; a ten-hour day is the usual limit prescribed. All the manufacturing states have legislated against excessive hours for young persons (of either sex) and have absolutely prohibited factory labor for children. In Massachusetts, New York, and several other states only children of at least fourteen years of age may be employed; in other states employment is permissible at lower ages. In England, under the general factory law of 1901, similar restrictions on industrial freedom of contract are imposed by the government, both the conditions of work and the permissible hours for employment of women, young persons, and children being made the subject of legislative interference. The German imperial government adopted in 1891 a factory act of similar scope. In the United States, Great Britain, and Germany legislation has not as yet limited the hours of employment of adult males; but in France and in Austria the law regulates the number of hours that even adult males may be employed in factory labor, eleven hours a day being assigned as the limit in Austria, and twelve in France.

The altered attitude of the state towards the working class is seen also in the systems of compulsory insurance and old-age pensions, now operative in various countries of continental Europe, and in certain Australasian colonies. In Germany an imperial law of June

15, 1883, provides for compulsory insurance against illness for all working people whose wages do not exceed $476 a year, the expenses of the insurance being imposed jointly on working people and employers, the former paying two thirds, the latter one third of the cost. A similar law of July 6, 1884, prescribes compulsory insurance against accidents. In each of these cases the government itself contributes nothing; but for the compulsory old-age pensions, established under an imperial statute of 1889, the government contributes yearly towards each pension a fixed sum of $11.90 over and above the amount accruing from the past contributions of the workingmen and their employers. France and Austria have also instituted compulsory state insurance against accidents (in Austria against illness also), and Italy, under a statute of 1899, has state insurance both against disability and old age. The colony of New Zealand, by a law of 1898, established a system of old-age pensions (with a maximum of £18 per annum) to be accorded by the government to persons of sixty-five years of age who had resided thirty-five years in the colony, no previous contribution being exacted from the recipient. Persons possessing an income from other sources are not eligible, or only eligible as pensioners to the extent that their income falls short of the pension. The tendency of the governments of the Australian colonies to interfere vigorously on behalf of the working class is seen in the New Zealand statute of 1894, applying compulsory arbitration to labor disputes, and in a similar statute of South Australia enacted in the same year.

Even the most extreme individualists admitted that the protection which it was the primary duty of the state to afford to the citizen did not merely include safeguards against physical violence and forcible robbery. Protection of an indirect character, intended to prevent fraud or culpable negligence, was admitted to be within the proper sphere of the state action. But in the course of the nineteenth century the category of legislation of an indirectly protective character has been enormously expanded. Such familiar examples as adulteration acts in reference to food, acts in reference to the inspection of steamboats and buildings, the granting of certificates to engineers, druggists, etc., will at once suggest themselves in this connection. Prohibition acts in restraint of the manufacture or sale of intoxicating liquors, acts in restraint of public gambling, etc., represent the same legislative principle carried to a further degree. In practice, the line is extremely difficult to draw between protective legislation — whose intention is to guarantee the individual against external harm and to prevent him from harming others — and paternal legislation, whose object is to compel him in a positive direction for his own good. The attitude of most modern governments is not clearly defined in this respect; but there is a large amount of modern legislation which is practically of a paternal character.

6. Municipal Control. Mention may be made in conclusion of the wide extension of state activity seen in the sphere of modern municipal control. Under present conditions the supply of water and light to towns and cities and the arrangement for interurban transportation, telephone communication, etc., offer problems of a peculiar character. To a great extent these services are in their nature monopolies; they must be under a single control, and cannot, or at any rate can only at an economic loss, be performed for the community by rival purveyors. Separate telephone systems, separate gas and water companies, with parallel pipes, separate car lines upon the same streets, are plainly impracticable. On the other hand, where these enterprises are placed unreservedly in private hands, the principle of monopoly price, as already explained, asserts itself to the detriment of the general public. It is necessary, therefore, either that the public authorities should themselves directly perform these services for the community, or that the grant of privileges accorded to a monopoly company should be accompanied by special restrictions and special regulation of the prices to be charged. A brief summary of the present extent of municipal ownership may serve to show how greatly the functions of the local organs of government have been expanded under recent conditions. The control of waterworks is the most universal of all municipal activities. Of the thirty-eight cities of the United States having, under the census of 1900, a population over one hundred thousand, all except eight owned their own waterworks in 1903. In this majority are included the cities of New York, Chicago, Philadelphia, and Boston. In Canada more than three quarters of the towns and cities (including Montreal and Toronto) own their waterworks. In the United Kingdom the municipal ownership of waterworks is almost universal, and in the continental cities of Europe it is the usual rule. Very few gas works in the United States are under municipal operation, but the larger British cities (except London, Liverpool, and Dublin) and most German cities operate their own gas plants. In the case of street railways municipal ownership is very rare in America, but has been adopted in about forty places in Great Britain, including London and Manchester. Municipal electric-lighting plants are extremely common in the United States, being found in Chicago, Detroit, and elsewhere, though ownership and operation by private companies is much more usual. In the United Kingdom, on the other hand, the majority of electric-lighting plants are operated by the municipalities. Telephone service is rarely found under municipal management, though in some cases, as in Japan and in Australia, it is directly conducted by the general government. Rarer examples of collective activity are seen in municipal house-building, sale of electric power, etc. It is, of course, impossible to enter here into the discussion of the economic advantages or disadvantages of municipal ownership. Reference is only made to it in this connection to illustrate the greatly widened sphere of state control characteristic of the present era.[1]

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[1] For further details see *New International Encyclopedia*, article "Municipal Ownership;" *Report of United States Commissioner of Labor*, 1900; Darwin, *Municipal Trade* (London, 1903).

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